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No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION,

Petitioner,

v.

THE UNITED STATES,
BROTHER INDUSTRIES, LTD., BROTHER INTERNATIONAL CORPORATION, SILVER SEIKO, LTD., and SILVER REED AMERICA, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Did the new Court of Appeals for the Federal Circuit err, as a matter of federal statutory law and as a matter of constitutional separation of powers principles, in its holding that the Commerce Department's promulgation and use of a "special rule" to "offset" a statutorily mandated deduction from "United States price", and the agency's reliance on cost differences to "adjust" the statutorily defined "foreign market value", the effect of which is to reduce or eliminate dumping margins in antidumping proceedings, can be upheld as an exercise of "broad discretion" by the administrative agency—even though allowing those rules to be applied is admittedly to permit negation of one statutory provision, to disregard the requirements of another statutory provision, and to create, in effect, an administrative irrebuttable presumption in favor of a standard that the Court acknowledged to be "inherently unreliable"?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner, the Smith-Corona Group of SCM Corporation,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on August 9, 1983.

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[1] SCM Corporation is incorporated in the state of New York and is not a subsidiary or affiliate of any other organization. SCM Corporation has many wholly owned subsidiaries and the following subsidiaries owned only in part (amount of ownership indicated in parentheses): Allied/Egry Business Systems, Inc. (99.85%); Compania Envasadora Loreto, S.A. (95%); Galvanizadora Centro-Americana S.A. (51%); Pinturas Centro-Americanas Costa Rica, S.A. (79.6%).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 713 F.2d 1568 (App. A, *infra*, p. 1a-27a). That opinion affirmed the order of the United States Court of International Trade entered on April 30, 1982 (App. B, *infra*, p. 28a-72a), and reported at 540 F. Supp. 1341.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on August 9, 1983. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 772 and 773 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, are set forth in a statutory appendix (App. C, *infra*, p. 73a-80a). The relevant provisions of the regulations of the U.S. Department of Commerce, International Trade Administration, are also set forth in an appendix (App. D, *infra*, p. 81a-82a).

STATEMENT OF THE CASE

1. Statute And Its Purpose

Since 1916 the United States has had laws designed to counteract price discrimination practiced by foreign producers in selling their products to the United States. The laws have always had as their object the protection of domestic industries and the industries' employees from competition characterized by prices lower to the U.S. than were available in the home market. Thus, the Senate Report to the Trade Agreements Act stated that:

> Subsidies and dumping are two of the most pernicious practices which distort international trade to the disadvantage of United States commerce. . . . Dumping is the general term for selling in another country's market at prices less than "fair value."

S. Rep. No. 249, 96th Cong., 1st Sess. 37 (1979). *See also Zenith Radio Corporation* v. *United States*, 710 F.2d 806, 811 (CAFC 1983). Price discrimination which results in injury to a domestic industry is unlawful and subject to offsetting duties (equal to the amount of price discrimination practiced) not only under U.S. law but also under Article VI of the General Agreement on Tariffs and Trade and under the Trade Agreement entered into by most developed nations in 1979.[2]

Congress has long been concerned that the antidumping law was not being administered in a manner to protect domestic industries and has adopted new laws or amendments to the old law in 1921, 1958, 1974 and 1979, all with the specific purpose of providing greater protection for domestic industries and their workers:

> Congress has long been concerned that the administration of the unfair trade practice laws has not effectuated its intention to prevent such unfair trade practices from placing domestic producers in jeopardy. Through the changes in present law made by this Title, the Committee reaffirms its intention that these unfair trade statutes be administered in a manner that will prevent such practices.

H.R. Rep. No. 317, 96th Cong., 1st Sess. 45-46 (1979); *see also, e.g.*, S. Rep. No. 1298, 93rd Cong, 2d Sess. 169

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[2] Subtitle B of Title VII of the Tariff Act of 1930, as amended, contains the antidumping duty law of the United States. As added by the Trade Agreements Act of 1979, that law conforms generally to the internationally adopted "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade," H.R. Doc. No. 153 Part I, 96th Cong., 1st Sess. 309-337 (1979).

(1974) ("The Committee over the years has sought a more vigorous enforcement of the unfair foreign trade practice statutes, including the Antidumping Act of 1921, which deals with injurious price discrimination.").

The Congress has established a very detailed statutory scheme for determining when offsetting dumping duties will be assessed and how the duties owed will be calculated. To establish the dumping margin (amount of price discrimination) of imported merchandise, the agency must determine both the foreign producer's price to the United States [the "United States price" (defined as either a price to an unrelated party, or, the resale price by a related purchaser to an unrelated third party adjusted for all expenses incurred in making the resale)] and the producer's price to customers in the foreign country of production [the "foreign market value"].[3] Each resulting price to be compared is intended to be an f.o.b. foreign port price.

Limited adjustments are permitted where evidence is submitted to the agency demonstrating that some part of the price difference is *due to* differences in circumstances of sale or merchandise between the U.S. and foreign markets. 19 U.S.C. § 1677b(a) (App. C, *infra*, p. 73a). Once thus computed, Congress has defined the antidumping duty to be assessed to be the difference between United States price and the price in the home market ["foreign market value"]. 19 U.S.C. § 1673.

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[3] Section 731 of the Act instructs the administering authority to compare foreign market value and United States price to determine the margin of dumping. 19 U.S.C. § 1673. "United States price" and "foreign market value" are defined in sections 772 and 773 of the Tariff Act of 1930, as amended. 19 U.S.C. §§ 1677a and 1677b (App. C, *infra*, p. 73a-80a).

Within the context of this carefully crafted statute, with extensive definitions of the two key concepts, Congress has assigned the administering authority[4] the task of executing its intention that U.S. industries and their workers be protected from price discrimination practiced by their foreign competitors. It is within this framework that SCM's petition can best be understood.

2. The Finding that Portable Electric Typewriters Were Being Dumped and the Domestic Industry Injured.

Nine years ago SCM Corporation ("SCM"), the only remaining domestic producer of portable electric typewriters, first petitioned for relief from dumping of these typewriters in the United States by Japanese competitors, including Brother Industries, Inc. ("Brother") and Silver Seiko, Ltd. ("Silver"). Despite the determination by the administering authority that there were large margins of price discrimination as early as 1974, it wasn't until six years later that SCM was able to secure the issuance of an antidumping duty order.[5]

Specifically, on May 9, 1980, an antidumping duty order was issued by the Commerce Department, 45 Fed.

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[4] Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979), Exec. Order 12188, 45 Fed. Reg. 989 (1980), charged the Commerce Department with enforcement of the antidumping duty law.

[5] An antidumping investigation was begun in 1974, and the Treasury Department found margins of dumping. By a three-to-two vote, the U.S. International Trade Commission ("ITC"), however, made a determination of no injury to SCM. *See*, 39 Fed. Reg. 10,456 (1974); 39 Fed. Reg. 44,053 (1974); 40 Fed. Reg. 12,685 (1975); USITC Pub. No. 732 (June 1975).

A second investigation was begun in 1979. After Commerce found margins of dumping as large as 48.7%, the ITC made a determination of material injury. *See*, 45 Fed. Reg. 1,220 (1980); 45 Fed. Reg. 18,416 (1980); USITC Pub. No. 1062 (May, 1980).

Reg. 30,618-19 (1980) (App. E, *infra*, p. 83a-85a). The order formally announced the determinations of the Commerce Department and the U.S. International Trade Commission that portable electric typewriters from Japan were being dumped in the United States to the material injury of SCM. The duty order found that Silver and Brother were dumping at, respectively, 36.53% and 48.70% *ad valorem*, *i.e.*, below their home market prices. These margins were even larger than had been found in 1974.

Brother and Silver immediately requested that Commerce make an "early determination of dumping duties" pursuant to Section 736(c) of the Tariff Act of 1930 (the "Early Determination"). After ninety days, the Department issued its early determination of dumping duties on August 13, 1980. 45 Fed. Reg. 53,853-56 (1980) (App. F, *infra*, p. 86a-96a). Under the agency's interpretation of the statute, dumping margins for Silver and Brother were found to be only 4.3 percent and 7.1 percent *ad valorem*, respectively, during this review period. By virtue of adjustments to foreign market value made by the Department of Commerce, massive price discrimination was simply explained away.

3. Proceedings in the Trial Court

On August 9, 1980, petitioner timely commenced an action in the United States Customs Court[6] contesting the Department's early determination of dumping pursuant to sections 516A(a)(2)(A) and (B)(iii) of the Act, 19 U.S.C. §§ 1516a(a)(2)(A) and (B)(iii). Petitioner asserted,

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[6] The United States Customs Court officially changed its name to the United States Court of International Trade on October 1, 1980, pursuant to the Customs Courts Act of 1980, Pub. L. No. 96-417, § 101, 94 Stat. 1727 (1980).

inter alia, that the adjustments to foreign market value permitted by the Commerce Department pursuant to 19 C.F.R. 353.15(c), the "Special Rule," and the adjustments to foreign market value for alleged "other differences in circumstances of sale" violated the express language of the statute, nullified part of section 772(e) of the Act, permitted adjustments where no *differences* were alleged, permitted the *ex post facto* explaining away of pricing differences on the presentation of alleged differences in cost where there was no evidence of any effect on price, permitted adjustments which were admittedly not directly related to the sales under consideration contrary to the legislative intent and case law, and that such agency practices were neither longstanding nor entitled to deference.[7]

In December 1980, having determined that petitioner was likely to succeed on the merits, the lower court issued a preliminary injunction which stayed the Department's early determination of dumping. *Smith-Corona Group, Consumer Products Division, SCM Corporation* v. *United States*, 1 CIT 89, 507 F. Supp. 1015 (1980) (App. G, *infra*, p. 99a-114a).[8]

On April 30, 1982, however, the trial court denied SCM's motion for summary judgment and granted the defendant's cross-motion for summary judgment. *Brother Industries, Ltd.* v. *United States*, 3 CIT ___, 540 F. Supp. 1341 (1982) (App. B, *infra*, p. 28a). That

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[7] *See, e.g.*, Transcript of Record filed in the Court of Appeals for the Federal Circuit, 408-417, a copy of which has been filed with this Court.

[8] *Smith-Corona Group, supra*, was consolidated with *Brother Industries, Ltd.* v. *United States*, on December 30, 1980, in an opinion reported at 1 CIT 102 (1980) (App. H, *infra*, p. 115a-117a).

court held that the "Special Rule," although not expressly permitted by statute, was a longstanding practice, impliedly endorsed by the Congress, was within the discretion permitted by the statute, and was entitled to great deference.

The court also held that the agency's practice with respect to adjustments for differences in circumstances of sale was lawful. Again citing the alleged longstanding administrative practice, congressional acquiescence, and heightened deference due that practice, the court upheld the agency's use of a presumption that differences in price in the two markets were due to differences in costs.

4. Decision Of The Court Of Appeals For The Federal Circuit

In its opinion of August 9, 1983, the Court of Appeals held that the challenged practices were *not* longstanding, and thus *not* entitled to heightened deference. The Court of Appeals further held that the legislative history showed no congressional approval of the Special Rule, or of the agency's reliance upon examination of *costs* in dumping determinations. The court pointed out Congressional rejection of cost as a computational basis for dumping margins, and the statutory requirement to use value and price figures, not cost. The court found that the Special Rule actually negated a section of the Statute in order to *lower* the dumping margin that the Statute requires and noted that despite a statutory requirement that adjustments be based on differences, the "Special Rule" adjustment was based on "similarities".

Despite a nearly point-by-point confirmation of the position of the appellant (SCM), the court nonetheless affirmed, reasoning that the statute provided a grant of "broad discretion" to the agency and "authority to administer the Statute fairly" empowering the agency to ne-

gate one statutory provision, to ignore the strictures of another, and to readjust under the banner of "fairness" the formula for calculating dumping margins laid down by Congress.

REASONS FOR GRANTING THE PETITION

SCM Corporation is the first opinion of the Court of Appeals for the Federal Circuit interpreting section 773(a)(4) of the Act and section 353.15 of the agency regulations (19 C.F.R. § 353.15)[9]—sections which are critical to the proper administration of the antidumping law in virtually every case brought before the agency. The principles of statutory construction which are applied by the Court of Appeals will guide the interpretation of the statute by the Court of International Trade and the Department of Commerce. It is crucial to the future administration of the nation's antidumping law that this first judicial review of this important provision be in accord with the Constitution and with long and well-established principles of statutory construction.

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[9] The Customs Court and the Court of International Trade have considered the predecessor section in the Antidumping Act, 1921, formerly 19 U.S.C. §§ 161(b) and (c), in *F.W. Myers & Co.* v. *United States*, 72 Cust. Ct. 219, 376 F. Supp. 860 (1974) and *Carlisle Tire & Rubber Co.* v. *United States*, 3 CIT ____, Slip Op. 82-37 (May 12, 1982). In addition, identical issues concerning the construction of section 773(a)(4) of the Tariff Act of 1930 are presently before the Court of International Trade in a number of cases, including *Timken Company* v. *United States*, Ct. No. 82-6-00890 (filed June 25, 1982).

I. THE RATIONALE ADOPTED BY THE COURT OF APPEALS WOULD RENDER THE STATUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY AND VIOLATES THE CONSTITUTIONAL REQUIREMENT OF SEPARATION OF POWERS.

A. The Court Of Appeals Construed Section 773(a) To Grant Limitless Discretion To The Commerce Department.

It is a well-settled constitutional principle that Congress cannot delegate power to an administrative agency without establishing intelligible principles to be applied by the agency. *E.g.*, *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394 (1928). This Court's opinions teach that in order to avoid holding a statute to be an unconstitutional grant of legislative authority, the delegation of authority should be limited in accordance with its language, history, and purpose. The Court of Appeals in this case, however, interpreted the statute to grant unlimited discretion to the Department of Commerce, rendering section 773(a) of the Tariff Act of 1930 constitutionally infirm for overbroad delegation.

1. The court below has eliminated the language of the statute as the intelligible principle for its application.

One might ascribe a host of meanings to the isolated phrase "other differences in circumstances of sale." But the phrase is not metaphysical; it was not conceived in a vacuum. Considered properly in the context of its legislative history and contemporaneous agency practice, the phrase defines the parameters of agency discretion. At a minimum, section 773(a)(4) of the Act permits adjustments only for "*differences*" in circumstances of sale.[10]

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[10] Section 773(a)(4) permits an adjustment to foreign market value only "if it is established to the satisfaction of the administering authority that the amount of any difference between United States

There is simply no way to justify the Special Rule by a statutory provision permitting adjustment for *differences* in circumstances of sale, when the Special Rule requires *no differences whatsoever* to bring it into play. As the Court of Appeals noted, the Special Rule is not based on differences in circumstances of sale but on "similarities." 713 F.2d at 1579 (App. A, *infra*, p. 20a-21a).

Under the holding of the Federal Circuit, the language of the statute—permitting adjustment only for "differences"—is subverted to the "broad discretion" of the agency. It is a construction which grants the Commerce Department authority unlimited by the express language of its enabling act.

2. The court below has eliminated the direct relationship standard.

The legislative history and contemporaneous agency action, in this case the regulations that the agency then administering the statute, Treasury, promulgated in 1960, negate the Special Rule and the consideration of indirect expenses that it sanctions. They mandate the conclusion that direct expenses are the only proper expenses to be considered as "other differences in circumstances of sale."

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price and the foreign market value . . . is wholly or partly due to . . . other differences in circumstances of sale. . . ." 19 U.S.C. § 1677b(a)(4) (App. C, *infra*, p. 76a). While Congress permitted the Commerce Department to determine to its "satisfaction" whether a difference in price is due to a difference in circumstances of sale, section 773(a)(4) cannot by definition apply where the circumstances of sale do not *differ*. The regulation itself, as did the Court of Appeals, concedes that the requirement stated in section 773(a)(4) of the Act has been waived; thus, the regulation begins as follows: "Notwithstanding the criteria for adjustments for differences in circumstances of sale. . . ." 19 C.F.R. § 353.15(c) (App. D, *infra*, p. 81a).

In 1957 the Treasury Department submitted recommendations proposing that Congress amend the law to provide for adjustments to foreign market value for "differences in circumstances of sale." *Hearings Before the Committee on Ways and Means, House of Representatives, on H.R. 6006, 6007, and 5120*, 85th Cong., 1st Sess. 11 (1957). In 1958, Congress so amended the statute, Pub. L. No. 85-630 § 2. 72 Stat. 583, and in 1960, Treasury promulgated regulations adopting the requirement that differences in circumstances of sale must be "directly related" to the sales under consideration in order to justify adjustment of foreign market value. T.D. 55,118, 95 Treas. Dec. 229, 232 (1960).

The impetus for limiting the scope of "other differences in circumstances of sale" to only those circumstances which were shown to be directly related to the sales under consideration arose out of the Treasury Department's experience between 1955 and 1960. Importers during that period claimed deductions from home market price on account of all manner of "selling expenses" under the banner "circumstances of sale."[11] Thus, the "direct rela-

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[11] In 1955, the Treasury Department had amended its regulations to provide for an adjustment "for any difference in quantities and circumstances of sale." T.D. 53,773, 90 Treas. Dec. 93, 96 (1955). According to the then Deputy Assistant Secretary of the Treasury, however, foreign producers abused the provision.

> In connection with selling expense they were claiming deductions for salesmen's salaries, for rent of office space the salesmen occupied or for depreciation on buildings or portions of buildings devoted to their use, and for any other portion of their general expense—salaries, maintenance, overhead, and so forth—which could be distinguished from the production effort. The resultant home market price calculations were claimed by them to be reduced to a point where initial apparent disparities again and again would, if the claims were allowed, completely disappear. Given sufficient imagination, lawyers and accountants can produce surprising results!
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> . . .

tionship" rule was promulgated to narrow the field of potential adjustments.

From 1960 until 1976, the only "differences in circumstances of sale" recognized by the antidumping regulation promulgated contemporaneously with that statutory phrase were those bearing "a direct relationship to the sales which are under consideration."[12] The language of the 1960 regulations was not changed for twelve years, at which time the prohibitions against consideration of indirect expenses were *strengthened*: In 1972 the circumstances of sale provision "was amended to delete the word 'reasonably' wherever it appears before the words 'direct relationship' to make clear that only circumstances of sale which are directly related to the sales of merchandise under consideration will be taken into account." 37 Fed. Reg. 26,298 (1972). In 1976, however, a new "Special Rule" was promulgated, permitting adjustments for what are acknowledged to be indirect selling expenses. T.D. 76-176, 41 Fed. Reg. 26,203-15 (1976).

The legislative history of the Trade Agreements Act of 1979 sanctions only adjustments which are "reasonably identifiable, quantifiable, and *directly related* to the sales under consideration." H.R. Rep. No. 317, 96th Cong., 1st Sess. 76 (1979) (emphasis supplied). *Indirect* expenses obviously fail to qualify. The "directly related" requirement, thus, was affirmed by the court below, affirmed by the Customs Court, *F.W. Myers & Co.* v. *United States*,

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> It was these considerations which gave rise to the revision in the regulations under the Antidumping Act published on July 5, 1960.

Hendrick, *The United States Antidumping Act*, 58 Am. J. of Int'l L. 914, 922-23 (1964) (emphasis supplied).

[12] 19 C.F.R. § 14.7(a) (1960-67); 19 C.F.R. § 53.8(a) (1968-1970); 19 C.F.R. § 153.8(a) (1971-76).

72 Cust. Ct. 219, 376 F. Supp. 860 (1974), and embraced by Congress.

The Court of Appeals noted that, "[t]he main problem with the offset is that it is not based on directly related costs. . . ." 713 F.2d at 1579 (App. A, *infra*, p. 20a). Yet, the court did not find that this limitation, imposed contemporaneously with the inception of the statutory provision, provided an intelligible principle against which section 353.15(c) of the agency's regulations might be judged.

3. The Court of Appeals has eliminated the structure of the statute itself as a guide for interpretation.

Petitioner argued that the Special Rule rendered section 772(e)(2) of the Act void and perverted the equation for calculating the amount of dumping duty to be imposed. Section 772(e)(2) of the Act, 19 U.S.C § 1677a(e)(2), requires that general expense incurred by a related-party importer in reselling the goods in the United States must be deducted from the resale price of the merchandise. (App. C, *infra*, p. 74a.) In this manner the statute arrives at a netback price which approximates what the f.o.b. origin price of the merchandise would have been had the foreign manufacturer sold directly to an unrelated U.S. importer. *See Brother Industries Ltd.* v. *United States*, *supra*, 540 F. Supp. at 1357 (App. B, *infra*, p. 49a-50a). Under the Special Rule, however, the agency permits a deduction from foreign market value up to the amount deducted from U.S. price under section 772(e)(2).[13] In effect, the Special Rule mathematically

[13] The deduction from foreign market value permitted by section 353.15(c) of the agency's regulations "offsets" the deduction from exporter's sales price required by section 772(e)(2) of the Act; thus the name, "exporter's sales price offset" or "ESP offset."

eliminates the deduction from the exporter's sales price, or U.S., side of the dumping equation by permitting an equal deduction from the foreign market value.

This Court has long held that, where possible, a statutory construction which would render a portion of the statute a nullity should be avoided. *See, e.g., United States* v. *Powers*, 307 U.S. 214, 217 (1939). Conceding that the Special Rule in effect negates another portion of the statutory scheme, the Court of Appeals nevertheless also discounted this guide for statutory construction. 713 F.2d at 1579 (App. A, *infra*, p. 20a).

4. As construed by the Court of Appeals, the statute lacks the requisite boundaries for interpretation of its scope.

In the years since this Court's decision in *A.L.A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495 (1935), it has become well-established that when faced with a potentially boundless grant of discretion by the legislature to an administrative agency the judiciary will preserve the constitutional dominion of Congress by examining the statutory language, purpose, and legislative history to discern standards which mark the bounds of agency discretion. *E.g., National Cable Television* v. *United States*, 415 U.S. 336, 342 (1974). To avoid a construction which would render a statute unconstitutional, the particular regulation or practice in issue must then be measured against the limits of agency discretion so revealed.

In this case, however, the language and history of the statute, *recognized by the Court of Appeals to be directly contrary to the operation of the Special Rule*, were deemed secondary to the authority of the agency under the broad grant of discretion which the court found. 713 F.2d at 1579 (App. A, *infra*, p. 21a).

It is undisputed that the statute requires that there first be "differences" before there can be an adjustment; it is undisputed that the "special rule" permits adjustments for circumstances not "directly related" to the relevant transactions; and it is undisputed that section 772(e) of the statute is effectively negated by the "special rule". These factors, then, should limit the agency's discretion. Professor Davis has aptly observed: "Vagueness of law or enforcement policy is unconstitutional because it permits or encourages arbitrary and discriminatory enforcement of the law." K. Davis, *Administrative Law*, § 3: 9 (1978). By eliminating the guideposts for the exercise of agency discretion from the language and structure of the statute and instead deferring to the agency's regulation "[i]n view of the discretion accorded the Secretary," the Court of Appeals has ignored the teaching of this Court to interpret statutory delegation narrowly to avoid rendering the statute unconstitutional.

B. The Court Of Appeal's Grant Of Authority To The Administrative Agency Elevates The Agency's Practice And Regulations Above The Statute And Its Purposes In Derogation Of Separation Of Powers.

Separation of powers is integral to our Constitutional scheme; it is not just an abstract principle. *Buckley* v. *Valeo*, 424 U.S. 1, 124 (1976). Although agency rulemaking may sometimes resemble lawmaking, "administrative activity cannot reach beyond the limits of the statute that created it." *Immigration and Naturalization Service* v. *Chadha*, 103 S. Ct. 2764 (1983). This Court has consistently held that "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law [but], 'the power to adopt regulations to carry into effect *the will of Congress as expressed by the statute.*' " *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214, *reh'g denied* 425 U.S. 986

(1976), citing *Dixon* v. *United States*, 381 U.S. 68, 74 (1965), quoting *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936) *(emphasis supplied)*.

When administrators promulgate rules that contradict the manifest intent of a statute, and thus exceed the scope of delegated authority, this Court invalidates the rules without hesitation.[14] In short, the decisions of this Court make it clear that administrative discretion ends where rulemaking begins to encroach on the authority reserved to Congress under our Constitutional scheme. *See Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979); *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 556 n. 20 (1979).

The meaning of a particular statute is determined through a three-part analysis, comprising examination of the language of the statute, the legislative history, and the agency practice. *See, e.g., Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103 (1978). The Court of Appeals began such an analysis but failed to measure the challenged agency regulations against the language and purpose of the statute with respect to at least two provisions: (1) the requirement that adjustments for differences in circumstances of sale are limited to those circumstances of sale *directly* related to the sales under consideration, and (2) the requirement that a *difference* be shown before an adjustment may be permitted. *See supra*, pp. 10-14.

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[14] *See, e.g., United States* v. *Larionoff*, 431 U.S. 864 (1977) (invalidating agency regulations that determined Variable Reenlistment bonuses by reference to the award level in effect at the time the serviceman began to serve the extension rather than at the time he agreed to it); *Leary* v. *United States*, 395 U.S. 6, 26 (1969) (finding marihuana transfer tax regulation so out of keeping with the statute as to be *ultra vires*).

Despite perceiving correctly the holding in *F.W. Myers* and the legislative intent that differences in circumstances must be "directly related" to the relevant sale, the Court of Appeals in this case upheld the Special Rule which it found "somewhat anomalous" because it permits an adjustment for circumstances which by definition are not directly related to particular transactions. 713 F.2d at 1578 (App. A, *infra*, p. 19a).

Moreover, the court below noted that the ESP offset, claimed to be lawful as an adjustment for "*differences* in circumstances of sale," in fact involved "similarities" between selling expenses in the home market and U.S. market. 713 F.2d at 1579 (emphasis in original) (App. A, *infra*, pp. 20a-21a). In addition, the Court of Appeals conceded that the ESP offset effectively negates another section of the statute. *See, supra*, p. 14-15.

Notwithstanding these parameters of statutory authority, the Court of Appeals upheld the Commerce Department regulation as a "proper and reasonable exercise of the Secretary's authority to administer the statute fairly." 713 F.2d at 1579 (App. A, *infra*, p. 21a). The court thus sanctioned the usurpation of the congressional function by the agency.

The opinions of this Court in the field of administrative law teach well that the Commerce Department cannot transgress the limits of the statute, limits which the Court of Appeals frankly discerned in the language, purpose, and history of the antidumping law. *E.g., Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979); *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 556, n.20 (1979).

This Court should exercise its jurisdiction to reverse the unprincipled grant of absolute authority which the

Court of Appeals has supplied to the Commerce Department. For Congress' words to be so plainly stated, so well understood, and yet ignored, usurps the legislative function. The agency, in effect, becomes legislature with the imprimatur of judicial approval, and together agency and court violate the separation of powers set forth in the Constitution.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. The Interpretation Of The Statute By The Court Of Appeals Creates An Invalid Irrebuttable Presumption Under *Interstate Commerce Commission* v. *J-T Transport Co.*

The Court of Appeals construed the Cost Rule, 19 C.F.R. § 353.15(d), which requires the agency to rely primarily on costs to determine the existence and the amount of differences in circumstances of sale, to constitute a rebuttable presumption. Citing the "economic logic of the assumption that cost is related to price," the court said, "We hold only that, absent evidence that costs do not reflect value, the Secretary may reasonably conclude that cost and value are directly related. . . . [O]nce that evidence is adduced, the 'burden' will be 'shifted' in every case." 713 F.2d at 1577 n. 26 (See App. A, *infra*, p. 16a, note 26).

In upholding such a presumption, the court ignored a critical fact: the evidence necessary to rebut such a presumption is in the hands of the foreign manufacturers.[15] An injured domestic industry has no

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[15] In fact, there was evidence of record that differences in circumstances of sales had *no effect* on the price of the merchandise. For example, there was evidence that the selling expenses claimed by Brother with respect to sales in the home market had no effect upon

statutory means to obtain discovery,[16] so that the presumption is, for all practical purposes, irrebuttable. Domestic producers will rarely be able to present any evidence at all showing that differences in costs do not reflect differences in value, much less meet the substantial evidence standard for judicial review.[17] The absence of evidence rebutting the agency's presumption of a cost-value relationship will nearly always be fatal to the domestic industry's case. Such a Catch-22 presumption cannot withstand scrutiny under the principle of law enunciated by this Court in *Interstate Commerce Commission* v. *J-T Transport Company*, 368 U.S. 81 (1961).

In *J-T Transport*, this Court considered a presumption created by the Interstate Commerce Commission that the loss of "potential" traffic to new applicants for contract carrier permits, would adversely affect existing carriers—even where the existing carriers had never

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Brother's home market prices. The nexus between increased selling expenses and increased prices in the home market which was presumed by the Court of Appeals was destroyed by the inverse relationship between actual costs and prices. Still, the presumption of a cost/value relationship could not be overcome. Transcript of Record filed in the Court of Appeals for the Federal Circuit, 39, a copy of which has been filed separately in this Court; *see also id.* at 932 (prices in the home market did not vary even though freight costs were different).

[16] *See, e.g.*, 19 U.S.C. §§ 1677e, 1677f. In *Budd Co., Railway Division* v. *United States*, 1 CIT 67, 72, 507 F. Supp. 997, 1001 (1980), the Court of International Trade observed:

> Congress has recognized that the administrative proceedings under Title VII of the Tariff Act of 1930 are investigatory, not adjudicatory. . . . Accordingly, no procedure has been established by statute nor by regulation promulgated thereto providing for discovery of an opposing party prior to or at the time of an investigation.

[17] 19 U.S.C. § 1516a(b) (1983).

handled such traffic. The applicant bore the burden of showing inadequacy of existing service, but the relevant evidence was peculiarly within the knowledge of the existing carriers. By operation of the presumption, the existing carriers would not be required to come forward with the evidence. The Court therefore struck down the agency's procedure, in favor of a procedure requiring existing carriers to show their ability to meet the needs of the shippers the new applicant would potentially serve. 368 U.S. at 90.

The language of the statute requires that a price difference "due to" differences in circumstances of sale be established to the "satisfaction of the Secretary." 19 U.S.C. § 1677b(a)(4) (App. C, *infra*, p. 76a). The Federal Circuit, however, instead of requiring the agency to obtain proof that price differences were "due to" differences in selling to the two markets, permitted the agency to substitute a presumption. "Establish to the satisfaction" has a settled meaning: that the party bearing the burden must come forward with evidence.[18] It does not mean that mere inferences like those of the challenged regulation will suffice.

Here, the Court of Appeals has approved an administrative presumption that an *ex post facto* presentation by the foreign respondent of the costs incurred in selling to different purchasers equates with a showing that differences in prices to different purchasers are due to differences in circumstances of sale. The burden then shifts to

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[18] *See, e.g., Anderson Co.* v. *United States*, 447 F.2d 41, 47 (7th Cir. 1971); *Vasquez-Mondragon* v. *Immigration and Naturalization Service*, 560 F.2d 1225, 1226 (5th Cir. 1977); *Small* v. *Immigration and Naturalization Service*, 438 F.2d 1125, 1127 (2nd Cir. 1971); *United States* v. *McLean Trucking Co.*, 400 F.2d 889, 891 (4th Cir. 1968).

the domestic industry to establish that costs do not reflect value. 713 F.2d at 1577 n. 26 (App. A, *infra*, p. 16a-17a note 26). Yet evidence of this relationship is contained in inaccessible pricing and cost data controlled by the foreign manufacturers.

Moreover, the Court of Appeals freely acknowledged that cost is a suspect factor, and that the legislative history contained "a long felt and understandable congressional distrust of *cost* as a basis for the computation of dumping margins. . . . [C]ost is subject to manipulation and Congress has recognized its inherent unreliability." 713 F.2d at 1576 (App. A, *infra*, p. 14a, emphasis in original). Hence, "[v]alue *must* be considered under the statute." 713 F.2d at 1575 (App. A, *infra*, p. 13a, emphasis in original).

Use of cost data is particularly pernicious, because the injured domestic industry cannot discover the records supposedly substantiating foreign producers' claims, nor, through discovery, identify a full range of "costs" incurred in selling to the U.S. but possibly not reported. *See*, *supra*, p. 20 note 16. Foreign manufacturers control the supporting documentation for costs, free from adversarial scrutiny. Congress has expressed its distrust of these suspect and unverified cost figures. Yet, by creating an administrative presumption, the Court of Appeals permitted this suspect factor, cost, to be the determinative factor.

B. The Court Of Appeals Upheld An Irrational Presumption.

In *Usery* v. *Turner Elkhorn Mining Co.*,[19] this Court held that for a statutory presumption to be valid, there

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[19] 428 U.S. 1, 28 (1976); *see, also, Tot* v. *United States*, 319 U.S. 463, 467-68 (1943); *Leary* v. *United States*, 395 U.S. 6, 32-36 (1969); *United States* v. *Romano*, 382 U.S. 136, 139 (1965); *Western & Atlantic R.R.* v. *Henderson*, 279 U.S. 639 (1929).

must be a rational connection between the fact proved and the conclusion presumed therefrom. The Court of Appeals simply ignored this settled rule of law and upheld an administrative presumption that the existence of differences in selling costs implies the existence of differences in the value of the merchandise in the marketplace. 713 F.2d at 1577 (App. A, *infra*, pp. 16a-17a). In so doing, the court below ignored its own interpretation of the legislative history of the Act—that costs were an unreliable basis for the determination of dumping margins.

Prices do not behave with sufficient predictability for the presumption to be valid. This Court noted the difficulties in correlating pricing policies with specific economic considerations in *Hanover Shoe* v. *United Shoe Machinery Corp.*:

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed, a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price.

392 U.S. 481, 492-493, *reh'g denied* 393 U.S. 901 (1968).

Particularly in the context of international trade and dumping, considerations other than costs often affect prices.[20] If situations exist, then, where a producer would

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[20] In his classic treatise *Dumping: A Problem in International Trade* 23-29 (1923), Jacob Viner explained how pricing decisions would be based on considerations other than cost:

> D. A producer may for a time sell at reduced prices in a market in which he is endeavoring newly to establish his trade in order to develop therein a demand for his products which will subsequently make possible their sale in that market at prices as high as those current elsewhere.

E. A concern may sell at dumping prices in a given market or to bring them to terms. Such dumping may be directed against the domestic producers of the market dumped on, or against competing exporters from the dumper's own country, or against competing exporters from a third country. It may be intended wholly to crush competitors, or it may have the more modest objective of inducing competitors by the threat of destructive competition to follow the prices quoted by the dumping concern, to share the market with it on specified terms, or otherwise to make their operations in the given market conform to the wishes of the dumping concern.

. . .

H. If a manufacturer can sell each year in his domestic market a part, but only a part, of his maximum possible output at higher prices than those ruling in outside markets, he may decide to maintain his domestic prices at this higher level and to seek foreign orders at reduced prices for the balance of his potential output in preference to reducing his domestic prices and in preference to operating only to part capacity. By resorting to dumping he may obtain the economies of operation at full capacity without surrendering the profits to be derived from the sale of part of his output in the domestic market at prices above the foreign level. A reduction in the domestic prices may be unprofitable, especially if the domestic demand for his products is inelastic, even in the absence of the possibility of resort to dumping. . . .

. . .

It is probable that in most actual instances of dumping no single motive is dominant but that some combination of the ones listed above, all of them concerned with private profit and not national policy are operative.

J. Viner, *Dumping: A Problem in International Trade* 26-29 (1923).

Not only are there reasons for dumping below full cost, but in many cases companies will price even below marginal cost. Davies and McGuinness, *Dumping at Less Than Marginal Cost*, 12 Int'l Economics 169 (1982). Dumping below marginal cost can occur in several situations: (1) Dumping under uncertainty—at the time of his output decision, the producer is faced by an uncertain net export price, perhaps because of floating exchange rates; (2) Dumping by the sales maximizing firm—the producer acts so as to maximize sales revenue rather than profits, perhaps due to a divorce of control from ownership; (3) Dumping as an entry deterrent—if a foreign monopolist is not able to enjoy monopoly prices in his home market without attracting competition from abroad, it may engage in loss-making dumping to discourage new entry.

set prices without regard to costs, no valid presumption can exist based upon the premise that prices will vary with costs.

The irrationality of the presumption is shown by its conflict with the logical assumptions underlying the statute. Congress enacted the statute to combat price discrimination. The evil it attacks is the dumping of foreign merchandise in the United States at less than its fair value. Thus the Statute itself *presupposes* that the foreign producer found to be dumping establishes its price, not by reference to its own costs, but by reference to prices in the United States.

But, the presumption created by the agency's interpretation of section 353.15(d) of its regulations is precisely that differences in selling expenses incurred by a manufacturer result in differences in price. And, the Court of Appeals upheld this presumption as a rational and reasonable exercise of discretion.

III. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE ADMINISTRATION OF THIS NATION'S UNFAIR TRADE STATUTES.

The Customs Court and the Court of International Trade have had few opportunities to date to construe section 773(a) of the Tariff Act of 1930 and its predecessor statute. *See*, *supra*, p. 9 note 9. As noted by the trial court below: "We are faced in this consolidated action with a number of highly complex issues which are of novel impression, and undoubtedly are of great significance in the administration of the nation's antidumping laws." 540 F. Supp. at 1346 (App. B, *infra*, p. 28a). Under the holding of the Court of Appeals, the Commerce Department now has the authority under section 353.15(c) to reduce or eliminate entirely dumping margins in any case where a

foreign manufacturer sells in the United States through a related-party importer. In addition, the Department has the ability under section 353.15(d) to permit significant reduction or elimination of dumping margins in every case in which a foreign manufacturer submits cost data showing differences between direct selling costs at home and in the United States.[21] The effect of this decision reaches to every domestic industry and every American worker that is materially injured by unfair price discrimination from abroad.

In the case of the exporter's sales price offset, the grant of "broad discretion" to the agency to adjust foreign market value is unfettered by the general rule adopted by the Congress that circumstances of sale should be directly related to the sales under consideration. Free of the general rule, apparently free to negate other sections of the statute, and bounded only by the amorphous requirement that it be "fair and efficient," virtually any regulation promulgated by the agency to redress whatever it considers to be "skewed" in the statute would be upheld by the courts below were the rationale of *SCM Corp.* to remain undisturbed.

Similarly, with respect to the practice of relying on costs in determining the existence of differences in circumstances of sale, the agency is apparently free to determine that adjustments for differences in quantities or for differences in merchandise can now be established by a

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[21] Moreover, the agency permits the foreign manufacturer to decide which "differences" to report and permits that manufacturer to report cost data which are the result of allocations performed by the foreign manufacturer notwithstanding that the foreign exporter has an incentive to report "differences" only to the extent that they reduce foreign market value and thereby reduce the dumping margins. *See* 713 F.2d. at 1580 (App. A, *infra*, pp. 22a-23a).

showing that costs differ.[22] The interpretation of the language "to the satisfaction of the administering authority," found in section 773(a) and relied upon by the Court of Appeals, would permit the agency to ignore elementary economics and to create presumptions which not only are irrational but are virtually impossible for the domestic industry to overcome.

In short, the opinion below poses significant problems for the administration of the antidumping law by stripping the statute of the very fundamental principles for application by the agency which the court below perceived to exist. That is, the court stated quite clearly that guidance was to come from the statutory language and scheme, yet its rule of the case renders the letter and spirit of the law insignificant in the face of the agency's discretion.

In terms of dollars and cents the annual effect of this holding on United States commerce is immense.[23] Virtually every antidumping case involves the application of section 773(a)(4) of the Act and section 353.15(a) and (d) of

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[22] Subsections (A) and (C) of Section 773(a)(4) of the Act, 19 U.S.C. 1677b(a)(4), permit the administering authority to make adjustments for differences in wholesale quantities and for differences in merchandise (App. C, *infra*, p. 76a). Presently, under section 353.14 of its regulations, the Commerce Department considers not only whether differences in quantities are shown by cost differences, but whether the usual practice of the industry in the country of exportation is to afford quantity discounts. 19 C.F.R. § 353.14. Presently, under section 353.16 of its regulations, the Department will not permit an adjustment for differences in production costs associated with particular merchandise absent a showing that the differences in production costs stem from a difference in the physical characteristics of the merchandise. 19 C.F.R. § 353.16.

[23] In this case alone over $100 million in imports annually are subject to the antidumping duty order.

the regulations.[24] And, in the majority of antidumping investigations, transactions with related parties and the use of the ESP offset are involved.[25]

These regulations have a substantial impact on margins of dumping in all antidumping cases. The failure of the courts below to apply properly this Court's well-established teachings in the fields of constitutional and administrative law can be expected to adversely affect the scores of domestic industries subject to import competition.

The Congress recently extended the right to judicial review on an administrative record to domestic industry to ensure that its purpose to protect that industry from unfair foreign price discrimination would not be subverted.[26] This first case involving this important section of

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[24] A list of 1982 and 1983 administrative cases in which section 773(a)(4) of the Act and section 353.15 of the regulations were directly applied is included in App. I, *infra*, p. 118a-125a.

[25] *See, e.g., "Options to Improve the Trade Remedy Laws," Hearings before the Subcommittee on Trade, Committee on Ways and Means, House of Representatives*, Serial 98-15, Part II at 678 (March 16, 17; April 13, 14, 19; and May 4, 11, 1983).

[26] The Trade Agreements Act of 1979 was promulgated precisely because the Congress continued to be dissatisfied with the administration of the predecessor Act by the Treasury Department. *See, e.g.*, H.R. Rep. No. 317, 96th Cong., 1st Sess. 45-46 (1979); S. Rep. No. 1298, 93rd Cong, 2d Sess. 169 (1974) (quoted *supra* pp. 3-4). An important part of the corrective scheme was intended to be resort to judicial review to ensure Congress' purpose was carried out by the agency. *See, e.g.*, S. Rep. No. 249, 96th Cong. 1st Sess. 252-253 (1979); *Zenith Radio Corporation* v. *United States*, 710 F.2d 806, 811 (CAFC 1983). The Customs Courts Act of 1980 furthered this purpose, conferring broader powers of equity on the Court of International Trade in order to ensure effective review of the administration of the antidumping law. *See, e.g.*, H.R. Rep. No. 1235, 96th Cong., 2d Sess. 20, 28-29 (1980).

the statute will not only guide the Commerce Department and the Court of International Trade for years to come, but will seriously impact the right of domestic industry to meaningful judicial review. This Court should, therefore, take the opportunity to guide the Court of Appeals for the Federal Circuit in applying settled principles of statutory construction to preserve Congress' mandate that American industry be protected from unfair foreign price discrimination and to avoid constitutional problems where none exist in the statute.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Federal Circuit.

Aug. 9, 1983.

Appeal No. 82-24.

SMITH-CORONA GROUP, Consumer Products Division, SCM Corporation, *Appellant*,

v.

The UNITED STATES, *Appellee*,

and

Brother Industries, Ltd., Brother International Corporation, Silver Seiko, Ltd., and Silver Reed America, Inc., *Parties-in-Interest*.

Eugene L. Stewart, Washington, D.C., argued for appellant; with him on brief was Terence P. Stewart, Washington, D.C.; Richard J. Sexton and Edwin Silverstone, New York City, of counsel.

Velta A. Melnbrencis, Washington, D.C., argued for appellee. With her on brief were J. Paul McGrath, Asst. Atty. Gen., David M. Cohen, Director and Francis J. Sailer, Washington, D.C.

Wesley K. Caine, Washington, D.C., argued for Brother Industries, Ltd. and Brother Intern. Corp. With him on brief were H. William Tanaka and Donald L.E. Ritger, Washington, D.C.

William H. Barringer, Washington, D.C., argued for Silver Seiko Ltd. and Silver Reed America, Inc. With him on brief were Noel Hemmendinger and Christopher Dunn, Washington, D.C.

Frederick L. Ikenson and J. Eric Nissley, Washington, D.C. and Philip J. Curtis, Glenview, Ill., were on brief for Zenith Radio Corp., amicus curiae.

Before RICH, Circuit Judge, SKELTON, Senior Circuit Judge, and SMITH, Circuit Judge.

EDWARD S. SMITH, Circuit Judge.

This appeal presents a challenge to various price adjustments granted to the foreign manufacturers and importers of the subject merchandise by the U.S. International Trade Administration (ITA) in determining antidumping duties under 19 U.S.C. §§ 1673 *et seq.* (Supp. V 1981). Appellant, a domestic manufacturer, appeals the April 30, 1982, decision and order of the U.S. Court of International Trade[1] (CIT) denying appellant's motion for summary judgment, granting the Government's motion for summary judgment, and dissolving the preliminary injunction that had previously been issued.[2] We affirm.

I.

Appellant, Smith-Corona Group, Consumer Products Division, SCM Corporation (Smith-Corona), is the last remaining domestic manufacturer of portable electric typewriters. Brother Industries, Ltd., and Brother International Corp. (collectively Brother) are, respectively, a Japanese manufacturer and an importer of portable electric typewriters from Japan. Intervenors, Silver Seiko, Ltd., and Silver Reed America, Inc. (collectively Silver), also are, respectively, a Japanese manufacturer and an importer of the subject merchandise from Japan.

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[1] *Brother Indus., Ltd.* v. *United States*, 540 F.Supp. 1341 (CIT 1982).

[2] *Smith-Corona Group, Consumer Prods. Div., SCM Corp.* v. *United States*, 1 CIT 89, 507 F.Supp. 1015 (CIT 1980).

On August 13, 1980, Commerce published in the Federal Register its "Early Determination of Antidumping Duties."[3] This determination concerns certain portable electric typewriters from Japan manufactured and imported by Brother and Silver and entered or withdrawn from warehouse on or after January 4, 1980, through May 7, 1980. As part of the early determination, certain adjustments were made to foreign market value, reducing substantially the estimated dumping margins.[4] Smith-Corona appealed to the CIT. On April 30, 1982, the CIT filed a memorandum and order affirming the August 13, 1980, Early Determination of Antidumping Duties in all respects. The instant appeal by Smith-Corona is from that judgment.

II.

The Tariff Act of 1930, as amended by the Trade Agreements Act of 1979,[5] establishes an intricate framework for the imposition of antidumping duties in appropriate circumstances. The number of factors involved, complicated by the difficulty in quantification of these factors and the foreign policy repercussions of a dumping determination, makes the enforcement of the antidumping law a difficult and supremely

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[3] Early Determination of Antidumping Duties, 45 Fed.Reg. 53,853 (1980). On January 4, 1980, the Treasury Department published its tentative determination that certain portable electric typewriters from Japan were being sold in the United States at less than fair value. Withholding of Appraisement, 45 Fed.Reg. 1,220 (1980). The International Trade Administration, U.S. Department of Commerce (ITA), on May 9, 1980, published an "Antidumping Duty Order." 45 Fed.Reg. 30,618 (1980). Pursuant to that order, Brother and Silver were required to deposit estimated antidumping duties, pending liquidation of entries.

[4] The dumping margins were reduced from 48.70% ad valorem for Brother and 36.53% ad valorem for Silver to 5.31% ad valorem and 14.91% ad valorem, respectively.

[5] 19 U.S.C. §§ 1673 *et seq.* (Supp. V 1981).

delicate endeavor. The Secretary of Commerce (Secretary) has been entrusted with responsibility for implementing the antidumping law.[6] The Secretary has broad discretion in executing the law. While the law does not expressly limit the exercise of that discretion with precise standards or guidelines, some general standards are apparent and these must be followed. The Secretary cannot, under the mantle of discretion, violate these standards or interpret them out of existence.

A.

The Antidumping Act provides that if foreign merchandise is sold or is likely to be sold in the United States at less than its *fair value* to the material injury of a United States industry, then an additional antidumping duty shall be imposed.[7] The

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[6] The Secretary of the Treasury was originally named as administering authority of the antidumping law. 19 U.S.C. § 1677(1) (Supp. V 1981). As noted by the CIT below, 540 F.Supp. at 1347 n. 4, almost all of Treasury's responsibilities were transferred to the Department of Commerce on January 2, 1980, pursuant to Reorganization Plan No. 3 of 1979, 44 Fed.Reg. 69,273 (1979). This appeal arose out of the Early Determination of Antidumping Duties by Commerce. *See supra* note 3.

[7] 19 U.S.C. § 1673 (Supp. V 1981) provides:

"§ 1673. Imposition of antidumping duties

"If—

"(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

"(2) the Commission determines that—

"(A) an industry in the United States—

"(i) is materially injured, or

"(ii) is threatened with material injury, or

"(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchan-

amount of the duty shall equal the amount by which the *foreign market value* exceeds the *United States price* for the merchandise.

Foreign market value and United States price represent prices in different markets affected by a variety of differences in the chain of commerce by which the merchandise reached the export or domestic market. Both values are subject to adjustment in an attempt to reconstruct the price at a specific, "common" point in the chain of commerce, so that value can be fairly compared on an equivalent basis. While the statute does not specify *where* in the chain of commerce price is constructed the specific statutory adjustments appear to indicate an "f.o.b. foreign port" price.

United States price, as defined in section 1677a,[8] is computed by one of two methods: purchase price or exporter's

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dise, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise."

[8] 19 U.S.C. § 1677a provides:

"(a) United States price

"For purposes of this subtitle, the term 'United States price' means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.

"(b) Purchase price

"For purposes of this section, the term 'purchase price' means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from the manufacturer or producer of the merchandise for exportation to the United States. Appropriate adjustments for costs and expenses under subsection (d) of this section shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.

"(c) Exporter's sales price

"For purposes of this section, the term 'exporter's sales price' means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, as adjusted under subsections (d) and (e) of this section."

sales price. The antidumping law attempts to construct value on the basis of arm's length transactions. The arm's length sale takes place at different points in the chain of commerce depending on whether the goods traveled through a related importer or through an independent, unrelated importer. Thus, different methods of computation of United States price are required depending on the relationship of the importer to the foreign producer.

Where the importer is an unrelated, independent party, purchase price is used. Purchase price is the actual or agreed-to price between the foreign producer and the independent importer, prior to the time of importation. Where the importer is related, an arm's length transaction does not occur until the goods are resold to a retailer or to the public. In that case, "exporter's sales price" is used. Exporter's sales price is the price at which the goods are eventually transferred in an arm's length transaction, whether from the importer to an independent retailer or directly to the public.

Both purchase price and exporter's sales price are subject to adjustment in order to derive a "fair" United States price for comparison with foreign market value. The adjustments provided in section 1677a(d) are applicable to both purchase price and exporter's sales price. The additional adjustments provided in section 1677a(e) are applicable *only* to exporter's sales price.[9]

On the other side of the scale, foreign market value is also computed on the basis of arm's length transactions by one of

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[9] 19 U.S.C. § 1677a(e)(2) provides:

"(e) Additional adjustments to exporter's sales price

"For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

* * * * * *

"(2) *expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise,* * * * [.]" (Emphasis supplied.)

three methods:[10] (1) home market sales; (2) third country sales; or (3) constructed value. The home market sales method is preferred. In the absence of such home market sales, the

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[10] 19 U.S.C. § 1677b provides:

"§ 1677b. Foreign market value

"(a) Determination; fictitious market; sales agencies

* * * * * *

"(1) In general

"The foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States—

"(A) at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption, or

"(B) if not so sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States.

* * * * * *

"(2) Use of constructed value

"If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that merchandise, as determined under subsection (e) of this section.

* * * * * *

"(e) Constructed value

"(1) Determination

"For the purposes of this subtitle, the constructed value of imported merchandise shall be the sum of—

"(A) the cost of materials * * * and of fabrication * * *;

statute provides that either third country sales or constructed value may be used. Foreign market value, computed on the basis of home market sales or third country sales, is subject to adjustment as provided in section 1677b(a)(4) to generate an f.o.b. foreign port value.[11]

Thus, the ITA, using either purchase price or exporter's sales price, computes and adjusts the United States price of the merchandise. Additionally, the ITA, on the basis of either home market sales, or third country sales, or constructed value, computes and adjusts the foreign market value of the merchandise. These values, which *should* be on an equivalent basis after adjustment, are then compared and the amount by which foreign market value exceeds United States price is imposed as an additional antidumping duty.

B.

The ITA determined that the United States prices of portable electric typewriters from Japan, produced by Brother and Silver, are less than the foreign market values of such or similar typewriters. United States price was based on pur-

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"(B) an amount for general expenses and profit * * *; and

"(C) the cost of * * * placing the merchandise under consideration in condition, packed ready for shipment to the United States."

[11] 19 U.S.C. § 1677b(a)(4) provides, in pertinent part:

"(4) Other adjustments

"In determining foreign market value, *if it is established to the satisfaction of the administering authority* that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly *due to*—

* * * * * *

"(B) *other differences in circumstances of sale;* * * *

* * * * * *

then due allowance shall be made therefor." (Emphasis supplied.)

chase price or exporter's sale price, as appropriate for any particular sale. Foreign market value was computed on the basis of home market sales by Brother and Silver of similar models for all of the entries subject to the antidumping duty. Brother and Silver received the benefit of a panoply of adjustments to foreign market value,[12] several of which are challenged by Smith-Corona.

III.

All of the adjustments challenged by Smith-Corona are adjustments to foreign market value. Specifically, Smith-Corona attacks the validity of two regulations under which several of

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[12] Home market sales were used to compute foreign market value for both Japanese producers. In the case of Silver, with respect to sales for which United States price was computed on the basis of purchase price, adjustments to foreign market value were made for differences in inland freight, packing costs, physical characteristics of the merchandise, and cost of production. With respect to sales for which United States price was based on exporter's sales price, foreign market value was adjusted for differences in inland freight, in the circumstances of sale (advertising, warranty and after sales service, packing costs, and after sales rebates), in commission expenses, in the physical characteristics of the goods, and for the exporter's sales price offset (selling expenses in home market up to amount of selling expenses in United States market). In the case of Brother, with respect to sales for which United States price was computed on the basis of purchase price, adjustments to foreign market value were made for differences in inland freight, in the circumstances of sale (advertising and selling expenses, warranty, rebates, packing costs, and certain direct advertising expenses), and in the physical characteristics of the merchandise. With respect to comparisons based on exporter's sales price, foreign market value was adjusted for differences in inland freight, in the circumstances of sale (after sales rebates, advertising expenses, packing and warranty expenses), in commissions, in the physical characteristics of the merchandise, and for the exporter's sales price offset. 45 Fed.Reg. 53,853 (1980).

the adjustments were made as well as the amounts of three of the specific adjustments granted to Brother and Silver.

In 1980, Commerce promulgated the antidumping duty regulations[13] at issue in this appeal. In order to facilitate adjustments for "other differences in circumstances of sale," under section 1677b(a)(4)(B), Commerce promulgated 19 C.F.R. § 353.15. That regulation sets out specific classes of adjustments[14] and provides criteria for determining the amount of allowances under section 1677b(a)(4)(B). 19 C.F.R. § 353.15(d) (1980) provides:

> In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such differences to the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise.

Smith-Corona attacks 19 C.F.R. § 353.15(d) on the ground that the regulation establishes a preference for *cost* that is inconsistent with the express requirement of section 1677b(a)(4) that differences in *price* or *value* must be due to differences in circumstances of sale.[15]

The regulation also provides a special adjustment not provided in the statute, the so-called "special rule"—the *exporter's sales price offset*:[16]

> (c) *Special rule.* Notwithstanding the criteria for adjustments for differences in circumstances of sale set forth in paragraphs (a) and (b) of this section, * * * [i]n making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses in-

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[13] 19 C.F.R. §§ 353.13-.23 (1980).

[14] 19 C.F.R. §§ 353.15(a), (b) (1980). Among those adjustments are advertising and selling expenses.

[15] *See supra* note 11.

[16] 19 C.F.R. § 353.15(c) (1980).

curred in the home market up to the amount of the selling expenses incurred in the United States market.

Smith-Corona challenges the exporter's sales price offset as being wholly inconsistent with the adjustments provided in the statute. Smith-Corona argues that the exporter's sales price offset is invalid because it contravenes certain adjustments to exporter's sales price provided in section 1677a(e)(2).

The remaining three challenges are to the amounts of three specific adjustments. With respect to these three specific adjustments to foreign market value, two were based on section 1677b(a)(4) providing adjustments for circumstances of sale. The third challenge is to the amount of adjustments to foreign market value under 19 C.F.R. § 353.16 (1980) for differences in the physical characteristics of the merchandise. Smith-Corona does not attack the validity of either section 1677b(a)(4) or 19 C.F.R. § 353.16 but, rather, it attacks the amount of each adjustment. Brother, Silver, and the United States all support the correctness of the amounts of these three specific adjustments as well as the validity of 19 C.F.R. §§ 353.15(c) and (d).[17]

Thus, to summarize, the issues presented in this appeal are

(1) whether 19 C.F.R. § 353.15(d), which allows the administering authority to compute allowances for differences in the circumstances of sale on the basis of *cost*, is valid (part IV.A of this opinion);

(2) whether 19 C.F.R. § 353.15(c), the *exporter's sales price offset*, is valid (part IV.B of this opinion);

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[17] The court is assisted, in its consideration of this appeal, by several amici curiae who have also submitted briefs: (1) Zenith Radio Corp.; and (2) several Japanese manufacturers and importers (Matsushita, Victor, USJVC, Sanyo, Hitachi, Toshiba, Sharp, Mitsubishi, and General). Zenith has adopted a position that substantially supports that taken by the domestic manufacturer, Smith-Corona. Similarly, the Japanese amici curiae substantially support the position taken by Brother, Silver, and the United States.

(3) whether it was error to adjust foreign market value for *after sales rebates* as differences in the circumstances of sale (part V.A of this opinion);

(4) whether it was error to adjust foreign market value for *advertising expenses* as differences in the circumstances of sale (part V.B of this opinion); and

(5) whether it was error to adjust foreign market value for *accessories and printed materials* as differences in the physical characteristics of the merchandise (part V.C of this opinion).

IV.

With respect to the validity of the challenged regulations, the relevant inquiries are whether the regulations are a proper exercise of the Secretary's authority and are reasonable.[18] In determining the reasonableness of the regulations, we are guided by the normal aids of statutory construction: statutory language, legislative history, and legislative purpose.

A.

In making adjustments to foreign market value for differences in circumstances of sale, 19 C.F.R. § 353.15(d) provides that the Secretary shall be guided primarily by the *cost* of such differences. Smith-Corona argues that reliance on cost, without any evidence of the effect of cost on price, violates the statute's explicit requirement that price or value differences be caused by differences in the circumstances of sale. The CIT, in a thoughtful and comprehensive opinion, held the regulation valid. In doing so, Judge Newman, writing for the court, relied on the Secretary's wide discretion under section 1677b(a)(4), the economic logic of the assumption that cost is related to price, and the long-standing administrative practice of using cost.

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[18] *See* 5 U.S.C. § 706 (1976); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 451, 98 S.Ct. 2441, 2445-2446, 57 L.Ed.2d 337 (1978).

The express language of section 1677b(a)(4) provides that allowances will be made if it is established *to the satisfaction of the Secretary* that the amount of any difference between the United States price and the foreign market value of the merchandise is wholly or partly due to differences in circumstances of sale.[19] The statute does not expressly limit the exercise of the Secretary's authority to determine adjustments, nor does it include precise standards or guidelines to govern the exercise of that authority. Additionally, the statute does not define the term "circumstances of sale" nor does it prescribe any method for determining allowances. Congress has deferred to the Secretary's expertise in this matter.

The language of the statute, as Smith-Corona and Zenith correctly point out, specifies that adjustments are to be made on the basis of differences in *price* or *value*. This approach is followed consistently throughout the antidumping law. Cost is generally relied upon only when value cannot readily be determined from price.

Antidumping duties are imposed on the basis of differences in value, *not* differences in cost. This importation of foreign merchandise can occur at a price greater than cost, yet still generate liability for an antidumping duty. The language of the statute would impose a duty on a foreign producer who "eats" either costs or profits in the American market relative to the home market. Thus, cost criteria alone will not redress the full margin of dumping to which Congress sought to attach an antidumping duty. Value *must* be considered under the statute.

Yet, the statute does not explicitly forbid reliance on cost. It even encourages the use of cost to fix foreign market value in some limited circumstances.[20] Additionally, the statute does

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[19] *See supra* note 11.

[20] Constructed value is one such cost-based criterion. 19 U.S.C. § 1677b(a)(2). The Government seems to rely on this provision as legislative endorsement of the use of cost. We do not believe that it is.

not vest broad discretion in the Secretary. Absent a specific provision forbidding cost-based adjustments, we cannot say that the express language of the statute clearly invalidates the challenged regulation, though it does cast shadows upon it.

The legislative history of the Trade Agreements Act of 1979, unfortunately, nowhere expressly addresses the use of cost to establish adjustments for differences in circumstances of sale.[21] The legislative history does, however, reflect general theoretical conflicts in legislative purpose.

Congress sought to afford the domestic manufacturer strong protection against dumping, seeming to indicate that the Secretary should err in favor of protectionism. The legislative history reflects a long felt and understandable congressional distrust of *cost* as a basis for the computation of dumping margins. Dumping is a prime example of unfair competition in which a foreign manufacturer ignores the normal market relationships of cost to price. Hence, cost is subject to manipulation and Congress has recognized its inherent unreliability. The legislative reports on the act also reflect a general dissatisfaction with administration of the prior antidumping law.

On the other hand, the Secretary is directed to make a fair and equitable valuation, which may reduce the antidumping margin as a result of downward adjustments to foreign market value. The 1979 act also shortened the time limits governing dumping determinations, mandating greater speed and, con-

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Constructed value is merely an attempt to reconstruct foreign market value by any suitable means from the available reliable evidence, not a blanket endorsement of the use of cost. Under § 1677b, although constructed value may be used without regard to the availability of a third country sales price, home market sales are clearly the preferred basis.

[21] S.Rep. No. 249, 96th Cong., 1st Sess. 1, *reprinted in* 1979 U.S.Code Cong. & Ad.News 381; H.R.Rep. No. 317, 96th Cong., 1st Sess. 1.

sequently, the necessity for using readily available, reliable information in the computation of duties.

No clear legislative intent or purpose emerges from the legislative history with respect to the use of cost. Thus, legislative history and purpose offer little aid in resolving this issue.

Some degree of deference is due the interpretation of the expert authority charged with the enforcement of the statute. The CIT felt that deference should be heightened by the Secretary's long-standing interpretation of the statute and by legislative acquiescence in that interpretation. We are not convinced, however, that the degree of deference accorded the Secretary's interpretation by the CIT was proper.

The Senate report expressly provides that Congress did not intend to express either approval or disapproval of the current regulations or administrative practice.[22] Thus, in terms of acquiescence, the most that can be said is that the Secretary's interpretation is cloaked with the diaphanous veil of a legislative "no comment."

Similarly weak is the argument that the regulation is long standing. The regulation was published in 1976,[23] and thus was hardly contemporaneous with the 1979 enactment of the implementing legislation, section 1677b(a)(4), 3 years *later*.[24] The regulation prior to 1976 did not articulate a preference for

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[22] S.Rep. No. 249, 96th Cong., 1st Sess. 96, *reprinted in* 1979 U.S.Code Cong. & Ad.News 381,482.

[23] The regulation was originally promulgated at 41 Fed.Reg. 26,204 (1976) and was codified at 19 C.F.R. § 153.10 (1976).

[24] *Cf. Zenith Radio Corp.*, 437 U.S. at 451, 98 S.Ct. at 2445-2446 (an administrative practice has peculiar weight when it involves a contemporaneous construction of a statute by an agency with responsibility for implementing the statute—deference given 80-year-old interpretation first promulgated within 1 year of passage of the countervailing duty statute).

cost. It differs from the regulation in effect after 1976 in precisely the area which is in dispute.[25]

This issue distills to the question whether a "causal link" must be established between the differences in circumstances of sale and the differential between United States price and foreign market value. The implicit assumption of 19 C.F.R. § 353.15(d) is that such differences very likely exist where there exist differences in cost. Judge Newman's well-reasoned opinion handles the "causal link" issue well. With the exception of his carrying back the date of the administrative practice reflected in the regulations we agree with his handling of this and all of the issues in this appeal.

Although the statutory language places primary reliance on the use of value and price, it gives the Secretary broad discretion in making adjustments. We conclude that the Secretary did not abuse that discretion by relying on the use of cost to make circumstances of sales adjustments.[26] The statute's pri-

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[25] Prior to 1976, the regulation was based primarily on value (in accordance with the statutory preference for value), cost being relied on only where appropriate—a transposition of those terms in the present form of the regulation:

> "(c) *Relation to market value.* In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the effect of such differences upon the *market value* of the merchandise but, where appropriate, may also consider the *cost* of such differences to the seller, as contributing to an estimate of market value." (Emphasis supplied.) 19 C.F.R. § 153.8(c)(1972).

See 540 F.Supp. at 1351.

[26] We do not hold that the Secretary may blindly rely on cost to the exclusion of its effect on value. Such would clearly violate the statute's primary reliance on value in the computation of antidumping duties, as well as its requirement of a direct relationship. We hold only that, absent evidence that costs do not reflect value, the Secretary may reasonably conclude that cost and value are directly related. Smith-Corona also argues that this would upset the burden of proof on the importer to establish entitlement to adjustments. We

mary reliance on value is not carried forward by language that would explicitly limit the discretion expressly granted the Secretary or would countermand the manner in which that discretion has been exercised in 19 C.F.R. § 353.15(d). The Secretary may not, however, rely on cost *to the exclusion* of its effect on value. The regulation does not *prohibit* reliance on value, but merely expresses a preference for cost; value may be considered, where appropriate. The Secretary must complete the determination within rigid time limits. The use of cost data may be the only reliable indicia of value.[27] We hold, therefore, that 19 C.F.R. § 353.15(d) is a proper exercise of the Secretary's authority and is reasonable. Thus, 19 C.F.R. § 353.15(d), insofar as it is challenged here, is valid.

B.

The exporter's sales price offset[28] is supported by the Government as a means to redress a perceived unfairness in the computation of foreign market value under the statute. Section 1677a(e)(2) provides for certain adjustments to exporter's sales price (United States price), which adjustments increase the dumping margin. The challenged offset allows adjustments to foreign market value, which offset reduces the margin. Smith-Corona argues that the offset thus renders section 1677a(e)(2) void and is, therefore, invalid.

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cannot agree. The use of cost criteria to satisfy the quantum of evidence required to establish entitlement is reasonable. Whatever the quantum of evidence that would "satisfy" the Secretary, once that evidence is adduced, the "burden" will be "shifted" in every case. Smith-Corona's remedy lies with Congress. Congress can provide more specific guidelines to govern the exercise of the Secretary's discretion; this court cannot.

[27] The ready availability of cost data that can be employed without extensive complex econometric analysis supports the reasonableness of the Secretary's decision to rely on cost. Cost may be the only *practical* way to administer the statute.

[28] 19 C.F.R. § 353.15(c).

The statute provides for the adjustment of United States price for certain specified "direct costs."[29] Section 1677a(e), however, provides for the adjustment of only exporter's sales price for certain "indirect costs"—selling expenses.[30] Commerce perceived that the United States price based on exporter's sales price was distorted by the adjustment for indirect costs and, accordingly, promulgated 19 C.F.R. § 353.15(c) to afford a similar adjustment to foreign market value.[31] Smith-Corona contends that the offset establishes two different fair value comparisons as a function of the basis for the computation of United States price. This allegedly contravenes the use of only *one* fair value by the statute. Arguably, regardless of the basis of United States price, purchase price or exporter's sales price, the same antidumping margin should result. Smith-Corona also argues that the statute establishes the fair value comparison on an "f.o.b. foreign port" price basis, and since the offset perturbs this result, the offset is invalid.

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[29] 19 U.S.C. § 1677a(d).

[30] 19 U.S.C. § 1677a(e) provides, in pertinent part:

"(e) Additional adjustments to exporter's sales price

"For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

* * * * * *

"(2) *expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise,* * * * [.]" (Emphasis supplied.)

[31] 19 C.F.R. § 353.15(c) (1980) provides:

"(c) *Special rule.* Notwithstanding the criteria for adjustments for differences in circumstances of sale set forth in paragraphs (a) and (b) of this section, * * * [in] making comparisons using *exporter's sales price, reasonable allowance will be made for all actual selling expenses* incurred in the home market up to the amount of the selling expenses incurred in the United States market." (Emphasis supplied.)

The statute does refer repeatedly to foreign market value, as if there were only one foreign market value under consideration. Yet, the statute does not expressly foreclose the use of two different United States price-foreign market value comparisons. Given the two methods of computation of United States price, it is apparent that the final United States price may be affected by the basis for the computation. United States price computed on the basis of exporter's sales price may result in an f.o.b. foreign port price *less* specified selling expenses. Computed on the basis of purchase price, United States price will generally be an f.o.b. foreign port price, *including* selling expenses. Given the differences in adjustments, it is apparent that the statute does not compel United States price to be the same irrespective of the method of computation.

In view of the statutory requirement of a direct relationship between circumstances of sale and the relevant transaction, the statutory deduction of selling expense from exporter's sales price, section 1677a(e), is somewhat anomalous. The absence of any such statutory adjustment to foreign market value, however, is entirely consistent with the statute's reliance on "direct costs." Thus, the challenged offset is inconsistent with the general requirement of a direct relation. It shares that inconsistency, however, with the statutory adjustment that it counteracts.

One of the goals of the statute is to guarantee that the administering authority makes the fair value comparison on a fair basis—comparing apples with apples. The offset appears to generate two fair value comparisons, apples with apples (purchase price) and oranges with oranges (exporter's sales price). The difference between United States price generated from purchase price and from exporter's sales price was created by the statute. Were it not for the exporter's sales price offset, comparisons based on purchase price would be fair, yet comparisons based on exporter's sales price would be skewed in favor of a higher dumping margin. We do not believe that the statute requires the Secretary to compare both apples and oranges with only apples. Rather, it expressly requires a fair

comparison. The offset is an attempt to achieve such a comparison.

As was the case with subsection (d), the legislative history and the legislative purpose are ambiguous on this question. The offset issue was not addressed substantively in the Trade Agreements Act of 1979. The legislative history does contain general statements to the effect that the Secretary should be both firm and fair. Yet, these generalities are not helpful in determining the validity of the offset.

The Secretary's interpretation is entitled to consideration, but here again, we cannot agree with the CIT that the Secretary's interpretation is entitled to heightened deference by virtue of either the long-standing application of that regulation or legislative acquiescence. The offset was originally published in 1976.[32] It was criticized by congressional committees and internally in the Commerce Department as being inconsistent with the statute's insistence on a direct relationship to the sales under consideration. Although Congress made no move against the offset, neither did it endorse it in the Trade Agreements Act of 1979.

The statutory language, therefore, is the only compelling evidence of record regarding the validity of the offset. Although the statute expressly requires a direct relationship between the differences in circumstances of sale and adjustments to foreign market value, we cannot conclude that the administering authority acted either beyond its authority or unreasonably in promulgating the offset. The offset does permit negation of one specific statutory adjustment to exporter's sales price, but does so to achieve a broader statutory purpose otherwise frustrated because of the alternative statutory methods of computing United States price.

The main problem with the offset is that it is not based on directly related costs, nor is it based on *differences* in the

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[32] The offset was originally published at 41 Fed.Reg. 26,204 (1976) and was codified at 19 C.F.R. § 153.10(b) (1976).

circumstances of sale but, rather, on similarities. Yet, these limitations are tempered by the very structure of the fair value computation under the statute. If the statute is skewed by the offset it is because the Secretary, in constructing a fair comparison, has erected the offset on a foundation that was already slightly askew. In view of the discretion accorded the Secretary under the statute to make adjustments to foreign market value, we conclude that the exporter's sales price offset, 19 C.F.R. § 353.15(c) is a proper and reasonable exercise of the Secretary's authority to administer the statute fairly. Thus, insofar as it is challenged here, 19 C.F.R. § 353.15(c) is valid.

V.

In terms of the amounts of the specific adjustments for differences in circumstances of sales and in the physical characteristics of the merchandise, the question is whether the adjustments were made in accordance with the statute and implementing regulations and whether the adjustments are supported by substantial evidence.[33]

A.

The ITA made adjustments, for after-sale rebates, to the foreign market value of portable electric typewriters imported into the United States by both Brother and Silver. Rebates were given on specific models as well as on total sales. Smith-Corona challenges only those adjustments for rebates based on total sales—for which some apportionment computation was required.

Silver granted volume rebates to Japanese customers for purchases of targeted quantities of certain Silver typewriters. Commerce computed the adjustments on the basis of expense to Silver. Silver granted rebates on sales of portable electric typewriters and other merchandise, necessitating apportionment of the rebate expense. Commerce initially computed the

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[33] 5 U.S.C. § 706.

ratio of the total sales amount of portable electric typewriters to the total sales amount of all merchandise subject to the rebate program. This ratio, multiplied by the total amount of rebate paid, yields the total amount of rebate paid for portable electric typewriter sales. Commerce then computed the ratio of the sales amount of each model of portable electric typewriter to the total sales of all portable electric typewriters and multiplied this figure by the total amount of rebate paid for portable electric typewriters to yield the yen amount of rebate paid for each model of portable electric typewriter. That figure, divided by the quantity of each model sold, yields the rebate amount per unit allowed as an adjustment to foreign market value.

Two of Brother's rebate programs are challenged: periodic and monthly. With respect to a portion of the recipients of the monthly rebate, the rebate was a fixed amount per unit, determined on the basis of the total number of all typewriters purchased. The remaining monthly rebates, based on a percentage of the total volume of portable electric typewriter sales, were computed by apportioning the expense among the various models sold and dividing by the quantity to each model sold to yield a per unit amount. With respect to periodic rebates, the total fixed yen amount of the rebate was divided by the total number of typewriters sold subject to the rebate to yield a per unit amount. Thus, the rebates were calculated directly from actual sales figures and from the total amount of rebate paid.

Smith-Corona challenges these specific rebates as not directly related to the sales under consideration because they were based on total sales. Allegedly, the rebates are not identified with specific sales and are not properly quantifiable and, therefore, not properly subject to adjustment.

The statute requires that the adjustment be for differences in circumstances of sales. Brother and Silver both offer the rebate in Japan and not in America. Thus, the rebates constitute differences that may be adjustable. The rebates based on total sales were apportioned, as described above, in an

attempt to correlate the rebates with the appropriate sales of portable electric typewriters within the pool of merchandise upon which the rebates were based. Relying on *F.W. Myers & Co.* v. *United States*,[34] Smith-Corona alleges that this apportionment is not adequate to establish a direct relationship to the sales under consideration.

In *Myers*, the Customs Court held that differences in circumstances of sale must have a reasonably direct relationship to the sales under consideration,[35] and that value determinations must be based on proof of *actual* costs not on estimates, approximations, or averages.[36] While *Myers* is not controlling here, we note that the adjustments nonetheless satisfy both criteria.

The rebates were actually paid on the sales under consideration. The effective cost to the manufacturer of the specific transactions subject to the rebates was increased by the amount of the rebates. More importantly, the apportionment of rebate cost was made on the basis of actual cost and sales figures. Despite the necessity of apportionment calculations to unravel the rebate transactions, the cost of the rebates can be directly correlated with specific merchandise using verified cost and sales information. While it would be simpler to make adjustments for a more direct rebate scheme, the necessity to undertake a straightforward mathematical analysis on the basis of verified, actual cost and sales data does not deprive these rebates of their direct relationship to the sales under consideration.

We conclude therefore that, in allowing these adjustments, the ITA acted within the framework of the statute and regulations and that the adjustments were based on substantial evidence.

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[34] *F.W. Myers & Co.* v. *United States*, 376 F.Supp. 860 (Cust.Ct.1974).

[35] *Id.* at 872.

[36] *Id.* at 873.

B.

Commerce also made certain adjustments to foreign market value, under 19 C.F.R. § 353.15(b), for certain "direct" advertising expenses incurred by Brother in the home market. The ITA allowed adjustments for 12 advertisements financed by Brother and aimed at the ultimate consumer. Some of these ads were for multiple products or involved a commemorative announcement. Commerce considered the adjustments to be for direct advertising expenses that were attributable to a later sale by a purchaser.

Smith-Corona challenges the adjustments for multiple product advertising and for institutional advertising as violative of the specific limitations of 19 C.F.R. § 353.15(b).[37] Smith-Corona argues that the challenged advertisements did not constitute the assumption by a seller of the purchaser's costs and were not attributable to a later sale of the merchandise to a purchaser. Additionally, it is alleged that the lead time involved in supplying the demand generated by the ads negates the direct relationship of the advertisements to the relevant sales.

Commerce allowed only a portion of the expense for the challenged advertisements based on its apportionment of these expenses to sales of portable electric typewriters. While the challenged ads were not exclusively directed to the relevant merchandise, a portion of each advertising effort was. In a

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[37] 19 C.F.R. § 353.15(b) (1980) provides, in pertinent part:

"§ 353.15 Differences in circumstances of sale.

* * * * * *

"(b) *Examples.* Examples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving * * * *assumption by a seller of a purchaser's advertising or other selling costs.* * * Allowances generally will not be made for differences in advertising and other selling costs of a seller, unless such costs are *attributable to a later sale of the merchandise by a purchaser.*" (Emphasis supplied.)

purely metaphysical sense, Smith-Corona is correct in that the ad expense cannot be directly correlated with specific sales. Yet, the statute does not deal in imponderables.

That portion of the advertising that featured portable electric typewriters was related to the expense of selling that merchandise. The presence of multiple products or institutional advertising in the same advertisement does not deprive the relevant portion of the advertisement of its direct relationship to the relevant sales.

Commerce accepted the direct relationship of the advertising expenses to the relevant sales without requiring evidence of the lead time involved in placing orders to meet the additional demand generated by the advertising. The statute establishes that the relationship between the difference in circumstances of sale and the particular sale be established to the *satisfaction* of the Secretary. There is no evidence of record to refute the Secretary's assumption. Thus, we cannot say that the Secretary abused his discretion in this regard. Nor can we say that the Secretary acted improperly in considering that quantum of evidence to be adequate. In the absence of evidence to the contrary, the Secretary could reasonably conclude that the advertising expense was related to sales during the relevant period. Thus, we must uphold the Secretary.

The ITA merely attempted to identify and isolate that portion of advertising expense that was properly adjustable. These direct expenses are differences in the circumstances of sale and, on the basis of the record before us, the direct relationship requirement of the statute and of the regulation has been satisfied.[38] The ITA apportioned the advertising expense on the basis of actual, verified cost data. We feel that this was entirely reasonable. We conclude, therefore, that the ITA acted within the framework of the statute and regulations and that the adjustments to foreign market value for Brother's

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[38] 19 U.S.C. § 1677b(a)(4)(B); 19 C.F.R. § 353.15(a).

"direct" advertising expense were supported by substantial evidence.

C.

The ITA also made adjustments to foreign market value for differences in the physical characteristics of the goods under 19 C.F.R. § 353.16.[39] Certain allowances were based on accessories and printed materials furnished with the merchandise by Brother. Portable electric typewriters sold in Japan were accompanied by spare typewriter ribbons and a pamphlet including a text on how to type. The merchandise sold for export to America consisted of the typewriter, without accessories, and with a pamphlet that did not include a typing instruction text.

Smith-Corona argues that the definition of the subject "merchandise" should be limited to portable electric typewriters. Consequently, differences in accessories or the pamphlet would not constitute differences in the physical characteristics of the merchandise.

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[39] 19 C.F.R. § 353.16 (1980) provides:

"§ 353.16 Differences in physical characteristics.

"In comparing the United States price with the selling price in the home market, or for exportation to countries other than the United States in the case of similar merchandise, *due allowance shall be made for differences in the physical characteristics of the merchandise* in the markets being compared. In this regard, the Secretary will be guided primarily by the differences in *cost* of production, to the extent that it is established to his satisfaction that the amount of any price differential is wholly or partly due to such differences, but, when appropriate, the effect of such differences upon the market value of the merchandise may also be considered. In the case of merchandise which does not lend itself to comparison with other merchandise for the purpose of this section, any method reasonably calculated to reflect the impact on cost or value of any differences in the merchandise under consideration may be used. Differences in costs of producing merchandise with identical physical characteristics as end products will not be considered appropriate adjustments." (Emphasis supplied.)

The ITA has defined the term differently, however, and our inquiry is at an end if that interpretation is reasonable. The statute attaches significance to differences in *value*. Accessories included in sales to one market *could* enhance the value of the merchandise in that market relative to the value in the market not provided with those accessories. There is no evidence of record tending to show that value was not enhanced. It is, therefore, reasonable for the ITA to make adjustments on the basis of those features as physical characteristics of the merchandise. We hold that the ITA acted within the framework of the statute and regulations and that the allowances for differences in the physical characteristics of the merchandise on the basis of accessories provided with the principal goods were supported by substantial evidence.

VI.

Our review of the statute reveals tremendous deference to the expertise of the Secretary of Commerce in administering the antidumping law. We find no specific limitation in the statute, nor do we find any evidence of record, that would compel reversal of the ITA's determinations in this proceeding. Insofar as they are challenged here, 19 C.F.R. §§ 353.15(c) and (d) constitute a proper exercise of the Secretary's authority under the antidumping law and are reasonable. Additionally, in determining the amounts of the three specific adjustments challenged by Smith-Corona, the ITA acted within the framework of the statute and regulations. The amounts of these specific adjustments are supported by substantial evidence. Accordingly, we affirm the judgment of the U.S. Court of International Trade sustaining the August 13, 1980, Early Determination of Antidumping Duties.

AFFIRMED.

APPENDIX B

United States Court of International Trade.

April 30, 1982.

Consolidated Court No. 80-9-01436.

BROTHER INDUSTRIES, LTD., and
Brother International Corporation,
Plaintiffs,

v.

UNITED STATES,
Defendant,

Smith-Corona Group, Consumer Products
Division, SCM Corporation,
Party-in-Interest.

SMITH-CORONA GROUP, CONSUMER
PRODUCTS DIVISION, SCM CORPORATION, *Plaintiff,*

v.

UNITED STATES, *Defendant,*

Brother Industries, Ltd., and Brother International
Corporation;

Silver Seiko, Ltd., and
Silver Reed America, Inc., *Parties-in-Interest.*

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT.

NEWMAN, Judge:

We are faced in this consolidated action with a number of highly complex issues which are of novel impression, and undoubtedly are of great significance in the administration of the nation's antidumping laws. The above-captioned cases arose out of the same determination by the Department of

Commerce, thus are largely interrelated and consequently—for the sake of expedition—were consolidated by this Court for review.

I.

BACKGROUND

Smith-Corona Group, Consumer Products Division, SCM Corporation ("SCM"), and the related companies of Brother Industries, Ltd., of Nagoya, Japan and Brother International Corporation, of Piscataway, New Jersey (collectively "Brother"),[1] challenge the "Early Determination of Antidumping Duties" by the International Trade Administration, United States Department of Commerce ("Commerce") in *Portable Electric Typewriters from Japan; Determination of Duty*, published in the *Federal Register* on August 13, 1980,[2] 45 FR 53853-56, as clarified and corrected in 46 FR 14006 (1980).

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[1] SCM filed the summons in Court No. 80-9-01343 and Brother filed the summons in Court No. 80-9-01436. SCM intervened as a party-in-interest in Brothers' case; Brother and Silver Seiko, Ltd., and Silver-Reed America, Inc., in turn, intervened in Court No. 80-9-01343. Subsequently, by an order of this Court entered on December 30, 1980, the two actions were consolidated pursuant to a motion filed by Brother; and a motion to sever by intervenors Silver Seiko, Ltd., and Silver Reed America, Inc. was denied. See 1 CIT—, Slip Op. 80-18 (1980).

[2] This determination was made pursuant to section 736(c) of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979, 19 U.S.C. § 1673e(c). See my decision in 1 CIT—. Slip Op. 80-17, 507 F.Supp. 1015 (1980) for the background of the "Early Determination of Antidumping Duties" by Commerce; and the memorandum and order granting SCM's application for injunctive relief, while denying Brother's cross-motion to dismiss for lack of subject matter jurisdiction. See also *SCM Corporation* v. *United States (Brother International Corporation, Party-in-Interest)*, 84 Cust.Ct. 227, C.R.D. 80-2, 487 F.Supp. 96 (1980) and *F.W. Myers & Co., Inc., et al.* v. *United States*, 72 Cust.Ct. 219, 220-21, C.D. 4544, 376 F.Supp. 860 (1974), for excellent summaries of the Antidumping Act and its administration by Chief Judge Re and Judge Maletz respectively.

SCM is the sole domestic manufacturer of portable electric typewriters ("PETs"). Brother Industries, Ltd. is a Japanese manufacturer of PETs and Brother International Corporation is an importer of such merchandise from Japan. Silver Seiko, Ltd. and Silver Reed America, Inc. (collectively "Silver") have intervened in these proceedings. The former is a Japanese manufacturer of PETs, and the latter is an importer of such merchandise from Japan.

At a previous stage of this litigation, SCM made application under section 516A(c)(2) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. § 1516a(c)(2)), to enjoin the liquidation of the entries that were the subject of Commerce's early determination of antidumping duties pending the final hearing and disposition on the merits of the action, and additionally, for certain incidental relief. Brother filed a cross-motion to dismiss for lack of subject matter jurisdiction, which cross-motion was opposed by SCM and the Government. Silver does not challenge the Court's jurisdiction. In 1 CIT ____, Slip Op. 80-17, 507 F.Supp. 1015 (December 30, 1980), this Court entered a memorandum and order: (1) granting SCM's motion for injunctive relief (thus, staying the liquidation of entries of PETs on and after January 4, 1980 to May 7, 1980, covered by the early determination of antidumping duties); (2) denying SCM's application for incidental relief; and (3) denying Brother's cross-motion to dismiss for lack of jurisdiction. The prior history of this case is summarized in my prior decision of December 30, 1980, and in the interest of brevity that background will be reiterated herein only to the extent necessary for discussion of the issues presently before the Court.[3]

In its early determination of antidumping duties, Commerce granted Brother and Silver a wide range of adjustments or

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[3] On October 14, 1980, oral argument was heard on SCM's requested injunctive and incidental relief, and Brother's cross-motion to dismiss. On March 4, 1982, oral argument was heard concerning the merits in this consolidated case pursuant to SCM's request.

deductions in determining the foreign market value of their PETs sold in Japan in the four-month period investigated that resulted in findings of various weighted average dumping margins.[4] The gravamen of SCM's action is that certain of these adjustments or deductions are contrary to law and unsupported by substantial evidence in the administrative record.

Specifically, the adjustments to foreign market value made by Commerce which are challenged by SCM are:

(1) Adjustment of the foreign market value of each typewriter model for differences in packing costs and in Japanese inland freight incurred in sales in the home market and to the United States.

(2) Adjustment of the foreign market value of each typewriter model by the amount of certain types of rebates in connection with sales in Japan.

(3) Adjustment of the foreign market value of each typewriter model pursuant to 19 CFR § 353.15(c), for the exporter's sales price offset ("ESP offset"), in those instances where foreign market value was compared with the exporter's sales price.

(4) Adjustment of the foreign market value of each Brother typewriter model for differences in physical characteristics by an amount that was equal to the difference in the costs of

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[4] The PETs covered by the early determination of antidumping duties were entered or withdrawn from warehouse for consumption on or after January 4, 1980 to May 7, 1980. January 4, 1980 was the date of publication by the Treasury Department of its tentative determination of sales at less than fair value, and the date on which liquidation was suspended (44 FR 1220); May 7, 1980 was the date of publication by the International Trade Commission of its affirmative final injury determination (45 FR 30188). On January 2, 1980, Treasury's responsibility for the administration of the antidumping law was transferred to the Commerce Department by the President's Reorganization Plan No. 3 of 1979 (44 FR 69275 and 45 FR 9931).

certain accessories and printed materials provided in connection with sales in Japan and to the United States.

(5) Adjustment to the foreign market value of each typewriter model by an amount for certain advertising expenses incurred in sales in Japan.

As is evident from the above, SCM has mounted a broad and multifaceted challenge to Commerce's early determination of antidumping duties.[5]

Brother's action contests the denial by Commerce of an additional adjustment to foreign market value for the cost of a promotional campaign conducted in Japan, namely the giveaway of transistor radios in connection with the sale of portable typewriters (including PETs). Brother contends that the disallowance was arbitrary and capricious or otherwise not in accordance with law.[6] In all other respects, Brother supports the adjustments made by Commerce and challenged by SCM.

Presently before the Court are SCM's motion for summary judgment and cross-motions for summary judgment by the Government, Brother and Silver. Silver takes no position on that aspect of Commerce's determination challenged by Brother.

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[5] SCM also challenges an alleged determination by Commerce granting Silver an adjustment for differences in merchandise for costs associated with the changeover of production lines. However, in light of the statements of defendant and of Silver that in fact no adjustment was granted to Silver for production changeover costs, SCM "does not at the present time further pursue this issue" (SCM's Brief, at 156).

[6] Brother's complaint also alleged that Commerce erred by including a certain typewriter (Brother Model No. 7800, ball-type typewriter) within the scope of the early determination. However, Brother has abandoned that claim.

II.

"CAUSAL LINK" ISSUE

We first consider SCM's argument that Commerce erred as a matter of law in granting the contested adjustments to foreign market value because no "causal link" was established between the differences in circumstances of sale and the differential between United States price and foreign market value, as required by 19 U.S.C. § 1677b(a)(4). In this connection, SCM argues that the Court must hold invalid the administering authority's reglation 19 CFR § 353.15(d) as being inconsistent with and in violation of the antidumping law. The "causal link" issue is the centerpiece of SCM's challenge to all of the contested adjustments.

SCM complains that Commerce in its early determination of antidumping duties made no finding of a causal link between the differences in circumstances of sale and the difference in the United States price and the foreign market value. Further, SCM contends that no information concerning a causal link was submitted by Brother or Silver to Commerce, nor was any such information requested by the administering authority.

The "causal link" issue presented by SCM arises from 19 U.S.C. § 1677b(a)(4), which so far as pertinent, reads:

> (4) Other adjustments.—In determining foreign market value, *if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value* (or that the fact that the United States price is the same as the foreign market value) *is wholly or partly due to*—
>
> > (A) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale, for exportation to, or in the principal markets of, the United States, as appropriate, in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale, in the principal markets of the country of exportation in the

ordinary course of trade for home consumption (or, if not so sold for home consumption, then for exportation to countries other than the United States);

(B) *other differences in circumstances of sales;* or

(C) the fact that merchandise described in paragraph (B) or (C) of section 1677(16) of this title is used in determining foreign market value.

then due allowance shall be made therefor. [Emphasis added.]

From a reading of the statute, it is clear that the party claiming entitlement to an adjustment of foreign market value must prove: (1) the existence of "other differences in circumstances of sales" within the meaning of the statute; (2) that the difference in United States price and foreign market value is wholly or partly *due to* other differences in circumstances of sale; and (3) the monetary value of the differences for which adjustments are claimed.

Focusing on the second requirement above, and particularly the language "due to" (denominated by SCM as the "causal link" requirement), it must be stressed that the statute requires only that a causal link be established to the *satisfaction of the administering authority.* But the statute provides no standards or guidelines as to how the administering authority is to determine whether the price differential is wholly or partly "due to" other circumstances of sale. Manifestly, then, since the statute sets forth no definitive criterion, Congress intended to rely upon the expertise and judgment of the administering authority to determine the criterion which will establish the existence of the necessary causal link between the difference in prices and differences in circumstances of sale. In granting adjustments to the foreign market value of the Brother and Silver typewriters, the administering authority was presumptively satisfied from the evidence submitted that the requisite causal link between the differentials in price and the differences in circumstances of sale existed in this case.

While 19 U.S.C. § 1677b(a)(4) does not define "other differences in circumstances of sales" or prescribe the method for

determining allowances, 19 CFR § 353.15 has been promulgated for that purpose. That regulation reads:

§ 353.15 Differences in circumstances of sale.

(a) *In general.* In comparing the United States price with the sales, or other criteria applicable, on which a determination of foreign market value is to be based, reasonable allowances will be made for bona fide differences in the circumstances of the sales compared to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences. Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration.

(b) *Examples.* Examples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising or other selling costs. Reasonable allowances also generally will be made for differences in commissions. Allowances generally will not be made for differences in advertising and other selling costs of a seller, unless such costs are attributable to a later sale of the merchandise by a purchaser.

(c) *Special rule.* Notwithstanding the criteria for adjustments for differences in circumstances of sale set forth in paragraphs (a) and (b) of this section, reasonable allowances for other selling expenses generally will be made in cases where a reasonable allowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual other selling expenses incurred in the one market, or the total amount of the commission allowed in such other market, whichever is less. In making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market.

> (d) *Determination of allowances.* In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such differences to the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise.

It is evident that section 353.15(d) assumes a causal link exists between differences in circumstances of sale and price differentials primarily where there are cost differences to the seller or, where appropriate, the differences in circumstances of sale have an effect upon the market value of the merchandise. In quantifying the reasonable allowances for any differences in circumstances of sale, the regulation specifies an administrative preference for considering the cost of such differences to the seller, "but where appropriate [the administrating authority] may also consider the effect of such differences upon the market value of the merchandise." Stated differently, section 353.15(d) provides, in effect, that if there are differences in circumstances of sale, and if there is also a price differential, then the administering authority will be satisfied that there is a causal connection between those events upon a showing either that the costs to the seller are different, or under appropriate circumstances, that the differences in circumstances of sale have an effect upon the market value of the merchandise.

SCM insists that 19 CFR § 353.15(d) is inconsistent with and in violation of 19 U.S.C. § 1677b(a)(4) because it permits the administering authority, when determining the amount of the reasonable allowance for differences in circumstances of sale, to "be guided primarily by the cost of such differences to the seller." Continuing, SCM maintains that the regulation's cost criterion is invalid, and that the only correct standard under the statute is the effect, if any, of differences in circumstances of sale upon the market value of the merchandise. Consequently, according to SCM, the regulation unlawfully eliminates the statutory requirement that a "causal link" be established between the selling price differential and the claimed differences in circumstances of sale. SCM also argues that the regulation is invalid because the statute is concerned with factors affecting selling prices, not with the differences in cost to the producer.

I must disagree with SCM's contention that regulation 19 CFR § 353.15(d) is violative of the statute:

First, regulation 19 CFR § 353.15(a) requires that it be established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to bona fide differences in the circumstances of the sales compared. Hence, while 353.15(a) sets forth the statutorily mandated causal link, it leaves open the *circumstances* in which the Secretary will be satisfied as to the existence of the causal link. Indeed, regulation 353.15(d) indicates that the Secretary will be satisfied that the price differential is wholly or partly due to differences in circumstances of sale upon a showing that there is a cost difference to the seller for the different circumstances of sale, with the amount of the allowance to be based upon the cost of such differences. It is stressed, however, that the regulation expressly permits the administering authority to also consider, when appropriate, the effect that differences in circumstances of sale may have upon market value of the merchandise.

But in determining the validity of regulation 353.15(d), it must be emphasized that under the *statute* whether a price differential is due to differences in circumstances of sale need only be established *to satisfaction of the administering authority*. Manifestly, the statutory language, "to the satisfaction of the administering authority" confers upon Commerce wide discretion in determining the existence of a "causal link". And plainly, the statute does not limit the administering authority to determining the effect of differences in circumstances of sale on market values, as urged by SCM. If the administering authority is satisfied that adjustments should be made to the foreign market values predicated upon differences in relative costs, as provided in the regulation, then that approach is well within the discretion granted by the statute, unless there is no rational connection between costs and prices.

Fundamentally, the regulation in question can be set aside by the Court only if the agency exceeded its statutory authority or the regulation is unreasonable. *United States* v. *Gruen*

Watch Co., 21 C.C.P.A. 225, T.D. 46761 (1933); *Alberta Gas Chemicals, Inc.* v. *United States*, 1 CIT 312, 515 F.Supp. 780 (1981). When the regulation is related to the purposes of the enabling legislation—as the case here—its validity should be sustained. *Cf. Kyle* v. *I.C.C.*, 609 F.2d 540, 542-43 (D.C.Cir.1980).

Aside from suggesting the possibility that factors other than a difference in costs for sales in the home market versus sales for export to the United States may account for a difference in selling prices, SCM cites no authority for its contention that the costs bear no rational relationship to the selling prices of merchandise. Silver, on the other hand, aptly points out that "[t]he relationship of cost to the determination of fair market value is an integral part of the statutory scheme of the anti-dumping law". Thus, where a foreign market value cannot be determined on the basis of prices of such or similar merchandise sold in the principal markets of the foreign country, the administering authority can determine such value under § 773(a)(2) of the Act (19 U.S.C. § 1677b(a)(2)) by use of "constructed value". As defined by § 773(e) of the Act (19 U.S.C. § 1677b(e)), constructed value is a cost-oriented method of valuation. Congressional recognition of the relationship between fair value and cost is also underscored by § 773(b) (19 U.S.C. § 1677b(2)), which requires the administering authority to disregard prices as the basis of foreign market value where those prices do not "permit the recovery of all costs within a reasonable period of time." The inclusion of these provisions in the law is undoubtedly recognition by Congress that there exists a direct relationship between cost and foreign market value as defined by the statute.

In the final analysis, one need not be an economist to recognize that under normal market conditions prices directly reflect costs.

Further, bearing upon the issue concerning the validity of 19 CFR § 353.15(d) is the fact that the regulation was promulgated in 1976 following what the Treasury Department re-

garded as its long-standing practice in the administration of the law. See paragraph 3, preamble to T.D. 76-176 (1976), 41 FR 26203 (1976). As stated in the notice:

> 3. Para. (d) of § 153.10 has been changed to provide that in determining allowances for differences in circumstances of sale, the Secretary will be guided primarily by the cost of such differences to the seller but, where appropriate, may also consider the effect of such differences upon the market value of the merchandise. * * * *These changes are intended to reflect long existing Treasury practice.* [Emphasis added.]

The administrative practice of permitting allowances for differences in circumstances of sale based upon the cost of such differences to the seller is a long-standing practice dating back to the 1960 Treasury Department antidumping regulations. When in 1958, Congress amended § 202 of the Antidumping Act of 1921 to include provisions for adjustments for "other differences in circumstances of sale", the Treasury Department promulgated its first regulations to administer the differences in circumstances of sale adjustment permitted by statute. Section 14.7(b)(2)(iii) of those regulations provided in pertinent part:

> (iii) In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the effect of such differences upon the market value of the merchandise but, where appropriate, *may also consider the cost of such differences to the seller, as contributing to an estimate of market value.* (Emphasis added.)

Hence, contemporaneously with the enactment of the amendment to § 202 of the Antidumping Act of 1921 permitting adjustments for "other differences in circumstances of sales," the Treasury, while guided "primarily" by a market value approach, was authorized to, and in fact adopted, the practice of "also" considering the cost of the differences to the seller. The importance of such a contemporaneous interpretation of the statute is pointed up in *Zenith Radio Corp.* v. *United*

States, 437 U.S. 443, 450, 98 S.Ct. 2441, 2445, 57 L.Ed.2d 337 (1977), where the Supreme Court said:

> Moreover, an administrative "practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 [53 S.Ct. 350, 358, 77 L.Ed. 796] (1933); *see, e.g., Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 [81 S.Ct. 1529, 1535, 6 L.Ed.2d 924] (1961).

Moreover, as a familiar matter of well-established principles of administrative law, a long-standing construction of a statute by an agency charged with its administration is afforded great weight by a reviewing court. *See, e.g., Zenith Radio Corporation* v. *United States, supra; Saxbe, Attorney General, et al.* v. *Bustos, et al.*, 419 U.S. 65, 74, 95 S.Ct. 272, 279, 42 L.Ed.2d 231 (1974); and *National Labor Relations Board* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267, 275, 94 S.Ct. 1757, 1762, 40 L.Ed.2d 134 (1974). This is especially true where, as here, Congress has re-enacted the statute without change, in the face of the long-standing practice. *Id.* Significantly, Congress enacted antidumping legislation in both 1975 and 1980, and on neither occasion did Congress in any way express disapproval of the practice in question, or on the latter occasion, the 1976 regulation itself.[7] When Congress thoroughly reviewed the United States antidumping legislation prior to enacting the Trade Agreements Act of 1979, it expressed specifically how it was departing from the substance of the prior law, as it related to the understanding of "foreign market value." Accordingly, from the legislative history, it is obvious that the only changes Congress intended in connection with the understanding of "foreign market value" were ones which

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[7] Congress enacted antidumping provisions in the Trade Act of 1974, Pub.L. 93-618, and the Trade Agreements Act of 1979, Pub.L. 96-39.

would put "third country price" and "constructed value" on an equal footing in terms of priority; would permit the use of averaging and sampling techniques in price calculations; and would give Commerce authority to disregard insignificant adjustments. In all other respects, Congress expressly intended to "retain existing law" concerning the term "foreign market value".[8] *See* S.Rep.No.96-249, 96th Cong., 1st Sess. 95 (1979), U.S.Code Cong. & Admin.News 1979, p. 381.

Indeed, as if to reinforce its manifest intent, the *Senate Report, supra*, states:

> *Reasons for the provision.*—Subtitle B of title VII of the Tariff Act, as added by section 101 of the bill, contains a comprehensive antidumping law. Many of the substantive rules of the Antidumping Act are reenacted in subtitle B. *The Committee does not intend to change the substantive rules except as specifically noted in this report.* Changes in organization and terminology have been made solely to modernize and clarify the terms of those rules. *Therefore, although the Antidumping Act, 1921, is replaced by subtitle B, the committee intends the administrative and judicial precedents relating to the terms under the Antidumping Act to continue to apply under the new law.* [Emphasis added.]

In connection with the above, it is significant that Congress was well aware of the 1976 regulation explicitly authorizing quantification of adjustments for differences in circumstances of sale on the basis of the cost to the seller when it enacted the Trade Agreements Act. In early 1979, the United States General Accounting Office ("G.A.O.") extensively studied the antidumping legislation and reported its findings to the Congress. *See* U.S. General Accounting Office, *U.S. Administration Of The Antidumping Act Of 1921; Report To The Congress*

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[8] Thus, the Senate Committee on Finance stated:

> *The bill*—Section 773 of the Tariff Act of 1930, as added by section 101 of the bill [*i.e.*, the provision defining "foreign market value"], *would retain existing law with several modifications.* [Emphasis added.]

By The Comptroller General Of The United States, ID-79-15 (March 15, 1979). With specific reference to the practice now challenged by SCM, the G.A.O. reported and explained (*id.*, at 27):

> Adjustments for circumstances of sale are quantified on the basis of the cost to the seller. Although Customs regulations provide that, where appropriate, the effect of these differences on the market value of the merchandise will be considered, officials explained that this is rarely practical because all merchandise is uniformly affected by circumstances of sale and it normally is not possible to isolate the effects on market value of each of these items.[9]

It clearly appears, then, that Congress knowingly declined to overturn the existing regulations or otherwise disapprove the practice in question when it extensively reviewed the antidumping laws.[10] Nevertheless, SCM strenuously argues against the foregoing conclusion by pointing to the following

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[9] In fact, Congress was made aware of this practice before it enacted the original provision for circumstances-of-sale adjustments in the 1958 amendment to the Antidumping Act, 1921, in Pub.L. 85-630, 72 Stat. 583. In testimony quoted by SCM at 71 of its memorandum, Assistant Secretary of the Treasury David W. Kendall explained to Congress how circumstances-of-sale adjustments were made under the then-existing antidumping regulations, and gave an example of an adjustment for a certain service guarantee provided by the manufacturer for bicycles sold for home consumption, but not for bicycles exported to the United States. The adjustment was computed exclusively on the basis of the cost to the manufacturer. *See Hearings on H.R. 6006, 6007, and 5120 Before the House Comm. on Ways and Means*, 85th Cong., 1st Sess. 39 (1957).

[10] SCM's quotation from a "Treasury Department Memorandum Relating to the Antidumping Act, 1921", at 38 (August 1961) for the rationale of using "price" as a measure of value, rather than seller's costs, is taken out of context. The excerpt quoted specifically relates to the allowance of quantity discounts, not to other differences in circumstances of sale or differences in physical characteristics. The terms "price" and "market value" are not necessarily synonymous. Moreover, the fact that using prices in determining adjustments for

language in *S.Rep.No.96-249, supra*, at 96, U.S.Code Code & Admin.News 1979, p. 482:

> This report is not intended as a general expression of approval or disapproval of current regulations or administrative practice. This should be emphasized with respect to regulations regarding the current law on dumping from non-market economies countries. The reenactment of current statutory provisions on this subject is not an expression of Congressional approval or disapproval of the regulations promulgated by the Secretary of the Treasury on August 9, 1978 (43 FR 35262).

Several points are relevant in connection with the foregoing statement. First, the Senate Finance Committee did not disapprove the current regulations and administrative practice, but in effect preserved the status quo, a status quo that other passages of the same Senate Report indicate that Congress was intent upon preserving, with "several modifications". Treating similar language in legislative history relating to the Trade Act of 1974, the Court of Customs and Patent Appeals reasoned in *United States* v. *Zenith Radio Corporation*, 64 C.C.P.A. 130, 145, C.A.D. 1195, 562 F.2d 1209 (1977), *aff'd*, *Zenith Radio Corporation* v. *United States*, 437 U.S. 443, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978):

> The effect of the Committees' mutually contradictory approve-disapprove statements is necessarily to leave untouched the status quo with respect to the administrative practice on countervailing duties. Finding no guidance in what the committees said, we look to what the Congress did. [Footnote omitted.]

And as noted by the Supreme Court in *Zenith Radio Corp.*, "whether or not Congress can be said to have 'acquiesced' in

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differences in wholesale quantities may be convenient does not support SCM's argument that it is more efficient to quantify differences in circumstances of sale on the basis of market value than on the basis of cost.

the administrative practice, it certainly has not acted to change it."

Second, a careful reading of the passage in question seems to indicate that the chief concern of Congress was regulations relating to non-market economies. The regulations specifically referred to in the passage, *i.e.*, those promulgated on August 9, 1978, dealt with non-market economies. *See* 43 FR 35262 (1978).

Another important consideration bearing upon the validity of 19 CFR § 353.15(d) is whether the regulation is reasonably related to the purpose of the circumstances of sale adjustment.[11] That purpose was enunciated in the legislative history of the 1958 amendment to the Antidumping Act, 1921 (predecessor to the current antidumping provisions), wherein the circumstances of sale provision was initially made a part of the scheme of the antidumping legislation, *i.e.*, *Pub.L.* 85-630. There, *H.Rep.No.1261, 85th Cong., 1st Sess. 7 (1957)* stated:

> Differences due to "other circumstances of sale".
>
> Under the bill as reported, provision is made (sec. 202(b)(2) and (c)(2)) for consideration of "other differences in circumstances of sale" in addition to quantity differentials. *This is designed to facilitate efficient and fair comparison between foreign market value and price to the United States market.* [Emphasis added.]

It is self-evident that without adjustments for differences in circumstances of sale, price comparisons would be essentially distorted and the objective of fairness would be defeated. And it is evident to this Court that the cost approach used to quantify adjustments for differences in circumstances of sale authorized by 19 CFR § 353.15(d) is consistent with the purpose of the circumstances of sale adjustment, as enunciated in the House Report, *supra*. Indeed, for all practical purposes, the cost approach in most instances is the only efficient means

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[11] *Cf. Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973).

of administering the circumstances of sale adjustment, considering that foreign market value and United States price must under the antidumping law be determined within very strict limits of time, *viz.*, 90 days in the instant proceeding. *See* 19 U.S.C. § 1673e(c)(1).

In direct contrast to the primary cost approach provided in 19 CFR § 353.15(d), the alternative market value methodology prescribed by the regulation is much more difficult, and in many instances impossible, to administer fairly and efficiently. To require Commerce to analyze the effects on market value of every difference in circumstances of sale would be to require a highly complex quantification process involving a multitude of economic factors, *including a cost analysis*, and to do so within strict time limits. I have no doubt that if the market value approach were the sole (or even the primary) method utilized for quantifying adjustments for differences in circumstances of sale, as a practical matter the resulting adjustments in many instances would be purely speculative or sheer guess work.

The present regulation, in any case, does contemplate the possibility of situations where a specific difference in circumstances of sale may bear no perceived market value (or a market value more or less than cost) in either the United States market or in the home market, since the regulation expressly provides that "where appropriate [the administering authority] may also consider the effect of such differences upon the market value of the merchandise". Consequently, the regulation, while it gives primary emphasis to cost differentials, does not preclude a market value analysis in appropriate instances.

In support of its argument that the current regulation does not in fact represent a long-continued administrative practice, SCM attributes much significance to the fact that in 1960 the antidumping regulation (19 CFR § 14.7(b)(2) (1960)) concerning adjustments for differences in circumstances of sale pursuant to § 202 of the Antidumping Act of 1921 provided that "the Secretary will be guided primarily by the effect of such differences upon the market value of the merchandise * * *".

Predicated upon this predecessor regulation, SCM challenges the statement of the Treasury published in T.D. 76-176 (1976), *supra*, that the 1976 regulation reflected long-standing practice on the part of that agency. Several observations are pertinent in this connection.

First, although regulation 14.7(b)(2)(iii) provided that the primary approach would be grounded on market value, the 1960 regulation by its terms expressly permitted consideration of the costs to the seller "where appropriate."

Second, since the 1976 statement by Treasury was an official published statement as to that agency's prior practice, it must be presumed that Treasury found it consistently "appropriate" to make adjustments by reference to costs. However, SCM has failed to show an administrative practice in conflict with the Treasury statement.

Finally, although the primary approach prescribed under regulation 14.7(b)(2)(iii) was market value, there is no doubt that Treasury's experience over a period of many years with the circumstances of sale adjustment indicated the necessity for primarily utilizing a cost rather than market value approach. But the cost approach prescribed in 19 CFR § 353.15(d) was not a revolutionary or abrupt change in methodology, as implied by SCM, inasmuch as under the prior regulation the seller's costs could be, and in fact were, considered.

In sum, the adjustments made by Commerce in the present case under 19 CFR § 353.15(d) were made pursuant to a valid regulation.

Since there is no merit in SCM's contention that Commerce could look only to the effect on market value in making adjustments for differences in circumstances of sale, its contention that the various adjustments in question are not supported by substantial evidence must also fail. Such contention was predicated upon the fact the record did not reflect that Commerce had requested, or that Brother and Silver had supplied, information demonstrating the effect of the claimed adjustments

on market values. Nonetheless, the record shows that Brother and Silver submitted voluminous documentation in support of their asserted adjustments to foreign market value on the basis of costs. Since Commerce, pursuant to its own regulation, properly looked to sellers' costs, it certainly had sufficient reason to be satisfied that the differences in circumstances of sale for which allowances or adjustments were in fact made, accounted in whole or in part, for the amount of the difference between the United States price and the foreign market value. Hence, the adjustments are supported by substantial evidence in the record.

III.

ESP OFFSET

In determining foreign market value, Commerce allowed certain adjustments to the home market selling prices of the Brother and Silver typewriters as "other differences in circumstances of sale" in accordance with its "Special Rule" set forth in 19 CFR § 353.15(c), which provides for the so-called exporter's sales price offset ("ESP offset").[12] *See* 45 FR 53855. Section 353.15(c) provides:

> (c) *Special rule.* Notwithstanding the criteria for adjustments for differences in circumstances of sale set forth in paragraphs (a) and (b) of this section, reasonable allowances for other selling expenses generally will be made in cases where a reasonable allowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual other selling expenses incurred in the one market, or the total amount of the commission allowed in such other market, whichever is less. *In making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home*

[12] The largest adjustment for the Silver typewriters and one of the largest adjustments for many of the Brother typewriters is the ESP offset.

market up to the amount of the selling expenses incurred in the United States market. [Emphasis added.]

Following the authority of the last sentence of paragraph (c) (the so-called "exporter's sales price offset" or "ESP offset") Commerce adjusted the foreign market value of Silver's PETs for various advertising expenses incurred in Japan up to the amount of the selling expenses incurred in the United States, and of Brother's PETs for certain home market selling expenses (payroll and payroll-related expenses, depreciation, other operating expenses, indirect advertising and promotional premiums). The ESP offset adjustments were made on the basis of evidence of the various *costs* involved.

SCM urges that the special rule is contrary to law because: (1) the adjustments are not directly related to the sales under consideration, which is allegedly required by legislative history as well as by judicial construction in *F.W. Myers & Co., Inc.* v. *United States*, 72 Cust.Ct. 219, 376 F.Supp. 860 (1974); (2) the adjustments are unilateral in nature (viz., the adjustments are not made by comparing similar expenses incurred by the foreign producer on its export sales in violation of the statutory language in Section 773(a)(4)(B), which permits adjustment for "differences in circumstances of sales"); and (3) the adjustment is not available equally in "purchase price" and "exporter's sales price" transactions. Additionally, SCM contends that the determination is not supported by substantial evidence because the record is devoid of any information which would demonstrate that the claimed differences in circumstances of sale are directly related to the sales under consideration or that the claimed differences account in whole or in part for the pricing differentials.

I find that SCM's contentions have no merit because the special rule is in conformity with the entire statutory scheme, constitutes a valid exercise of the statutory discretion granted in Section 773(a)(4), is neither precluded by legislative history nor by *F.W. Myers*, and represents a long existing administrative practice.

Under the antidumping statute, duties are imposed in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise, which latter term means "purchase price" or the "exporter's sales price" of the merchandise, whichever is appropriate. Sections 731 and 772(a) of the Tariff Act of 1930, as amended, 19 U.S.C. 1673 and 1677a(a). "Exporter's sales price," in turn, is defined in the first part of section 772(c) of the Act, 19 U.S.C. 1677a(c) as "the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter * * *." If the definition had stopped there, then in comparing foreign market value with the exporter's sales price, no adjustment to either the foreign market value or the exporter's sales price would have been necessary because Congress would have expressed its intent that there be a comparison between the price in the home market and the price in the United States. However, Congress went further, and in the very same sentence of section 722(c) provided:

> as adjusted under subsections (d) and (e) of this section

Subsection (e) of section 772(c), 19 U.S.C. 1677a(e), of course, specifically provides that the exporter's sales price must adjusted by being reduced by the amount, if any, of:

> (1) commissions for selling in the United States the particular merchandise under consideration,
>
> (2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and
>
> (3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

By stripping all of the selling expenses incurred in the United States from the exporter's sales price, Congress made it plain that it did not want a comparison between a price in the home market and a price in the United States market (which

prices would then properly reflect all selling expenses incurred), but rather between a price in the home market and a price for export to the United States. Accordingly, then, the intent of the exporter's sales price adjustment is to permit an estimation of the "true" *f.o.b.* foreign port price for the merchandise under consideration in an arms-length transaction regarding an importation made by a party related to the exporter.[13] The explanation in Senate Finance Committee Report No. 1619 at 10, makes it clear that the 1958 amendment to the Antidumping Act, which first added the provision for other differences in circumstances of sale, was "designed to facilitate efficient and fair comparison between foreign market value and price to the United States market." Obviously, it would have been unfair to continue comparing an unadjusted foreign market value with an adjusted exporter's sales price from which all selling costs have been deducted in circumstances where the foreign market value represented a price higher because of inclusion of the manufacturer's selling costs in the home market.

In 1976, Treasury amended the Customs regulations and acknowledged its long-existing practice to permit the ESP offset. *See* paragraph 2, preamble to T.D. 76-176, *supra*. Interestingly, Congress took no steps concerning the Trade Agreements Act of 1979 to eliminate this long-established administrative practice, as codified in the 1976 regulation, while reenacting without change the statutory circumstances of sale provision.

Importantly, just prior to the enactment of the Trade Agreements Act, the attention of Congress was specifically drawn to

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[13] The rationale for the adjustment for commission and selling expenses was described in the Senate Finance Committee Report No. 16, 67th Cong., 1st Sess. at 12 (1921) as follows:

> In substance, the term "exporter's sales price" is defined in such manner as to make the price the net amount returned to the foreign exporter.

the provision for the ESP offset as a "circumstances of sale" allowance.[14] Thus, in the report prepared by the G.A.O., *supra*, the Congress was specifically advised as follows (G.A.O., *U.S. Administration Of The Antidumping Act Of 1921*, *supra*, at 24):

Circumstances of sale

Fair value comparisons are further complicated by disagreements over the identification and treatment of allowances arising from differences in commercial practices. * * * *In particular, controversy has developed over two aspects of Treasury regulations, which provide that—*

* * * * * *

> —"in making comparisons using exporter's sales price, reasonable allowance will be made for actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States" [Emphasis added.]

Thus, Congress was fully aware of the controversial ESP offset and declined to change it in anyway. As noted, *supra*, in enacting the Trade Agreements Act, Congress meticulously identified the instances where it was making changes in the law relating to foreign market value. There is not the slightest suggestion in the legislative history that the long-continued ESP offset practice was to be affected by the new legislation. On the contrary, the Senate Report No. 96-249, at 106, U.S.Code Cong. & Admin.News 1979, p. 493, states:

> The Committee does not intend to change the substantive rules except as specifically noted in this Report * * * therefore, although the Antidumping Act, 1921, is replaced by Subtitle B, the Committee intends the *adminis-*

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[14] It is also significant that at the time Congress was considering the Trade Agreements Act, the offset provision was contained in a 1976 regulation entitled "Differences in circumstances of sale" (19 CFR § 353.15).

> *trative* and judicial *precedents* relating to the terms under the Antidumping Act to continue to apply under the new law.

and at p. 96, U.S.Code Cong. & Admin.News 1979, p. 482:

> * * * Section 773 of the Tariff Act of 1930, as added by section 101 of the bill, would generally retain existing law as it relates to the use and *calculation of foreign market value* * * * [Emphasis added.]

In sum, I see nothing in the legislative history cited by the parties that contravenes the validity of the ESP offset; and as previously noted herein, inasmuch as the current Commerce regulation reflects a long-standing administrative practice, acquiesced in by Congress, such practice is entitled to great deference. *Zenith Radio Corp.* v. *United States, supra.*

To support its contention that the ESP offset is not permissible as an adjustment for differences in circumstances of sale, SCM heavily relies upon the *F.W. Myers* holding. That case, however, is factually and legally distinguishable from the present case. In short, *F.W. Myers* involved purchase price, not exporter's sales price, transactions, and therefore the Court was not presented with the issue of the validity or application of the ESP offset in determining foreign market value. Moreover, *F.W. Myers* ultimately turned upon the plaintiffs' failure to substantiate the amounts of their claimed adjustments for differences in circumstances of sale.

Another vital aspect of Congressional intent respecting the ESP offset, briefly mentioned above, is the fact that the regulation effectuates the purpose of the circumstances of sale provision, which is "designed to facilitate efficient and fair comparison between foreign market value and price to the United States market." *H.Rep.No. 1261, supra,* at 7. Specifically, the purpose of the exporter's sales price offset is to permit a fair price comparison in related party transactions where a deduction is made pursuant to 19 U.S.C. § 1677a(e) for selling expenses generally incurred by the related importer in selling the merchandise in the United States, including items

of general administrative and overhead expense that are not directly related to the sales involved. The calculation of dumping margins would be severely distorted if no offsetting adjustments were permitted in the calculation of foreign market value. In point of fact, a margin could be found simply because the foreign market value in question reflected the selling cost in the home market which the producer was absorbing. This unfairness is eliminated, in part, by the ESP offset since it prevents the imposition of antidumping duties solely as a result of the selling expenses incurred by the manufacturer in the home market. Since, as noted above, the circumstances of sale provision was intended by Congress to facilitate fair comparison between foreign market value and price to the United States market, and since the ESP offset is designed to effectuate that intent, SCM's argument that the ESP offset violates Congressional intent is completely without merit.[15]

I have carefully considered SCM's contentions that Commerce's "Special rule" providing for the ESP offset is invalid because: (1) the rule allows adjustments that are not directly related to the sales under consideration; (2) the rule allows "unilateral" adjustments for home market selling expenses that are not compared with similar expenses incurred by the foreign producer in its export sales, and thus permits allowances that are not adjustments for "other *differences* in circumstances of sale" (emphasis by SCM); and (3) the rule permits adjustments that are not available equally in "purchase price" and "exporter's sales price" transactions.

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[15] While Brother and Silver do not challenge the ESP offset adjustments granted by Commerce, both parties complain that the ESP offset regulation does not go far enough in that it limits the deduction from "foreign market value" to the amount of the actual selling expenses incurred in the United States. They argue that logically there should be a deduction from the home market price for *all* actual selling expenses, as is done for United States price. We need not address this argument here, since, as noted, there is no challenge by Brother and Silver to the ESP offset deduction made by Commerce.

With reference to point (1), I see nothing in the language of the statute or its legislative history or in *F.W. Myers* that compels the conclusion that adjustments for differences in circumstances of sale be directly related to the sales under consideration *in ESP transactions*. While it is true that under 19 CFR § 353.15 adjustments are limited, "in general", to circumstances of sale having a "direct relationship to the sales which are under consideration", the provision for the ESP offset is expressly deemed a "[s]pecial rule".

Second, the legislative history of the Trade Agreements Act of 1979 strongly indicates that Congress regarded the ESP offset as an adjustment for differences in circumstances of sale. On this score, the ESP offset regulation was specifically called to the attention of Congress by the Comptroller General in the G.A.O. report of March 15, 1979, *supra*, at 24. Significantly, both the G.A.O. report and the regulation directed the ESP offset to Congress's attention as a *circumstances of sales adjustment*.

Third, although the legislative history of the Trade Agreements Act of 1979 reveals that the new term "United States price" was utilized to incorporate the existing terms "purchase price" and "exporter's sales price" (*S.Rep.No.96-249, 96th Cong., 1st Sess. 93 (1979)*), I see nothing in the legislative history cited by SCM that indicates Congress thereby intended to preclude the ESP offset practice (which had been called to its attention) because a similar offset was not permissible in purchase price transactions. Had Congress intended to devitalize the "Special rule" granting an ESP offset, it surely would not have contemplated that "Regulations will establish groups of adjustments based on types of adjustments currently recognized, that is differences in circumstances of sale * * *". *H.R.Rep.No.96-317, 96th Cong., 1st Sess. at 76* (1979).

IV.

ADJUSTMENTS FOR INLAND FREIGHT AND PACKING COSTS

Commerce's early determination of antidumping duties made allowances in determining the foreign market value of the PETs imported by Brother and Silver for differences in Japanese inland freight charges and differences in packing costs incurred in sales in the home market and for export to the United States. 45 FR 53853-55. SCM contends that these adjustments are contrary to the statutory definition of foreign market value in section 773(a) of the Act, the legislative history, basic rules of statutory construction and regulatory practice of the Treasury, and are unsupported by substantial evidence.

I conclude, however, that SCM's contentions have no merit because the allowances for inland freight and packing cost differentials were properly granted in determining the foreign market value as differences in circumstances of sale.

During the 1957 hearings on the proposed amendment to the Antidumping Act of 1921 respecting the proposed provision for other differences in circumstances of sale, Treasury advised Congress that in making fair value comparisons it was necessary to reduce the two prices being compared to comparable terms; and that in its simplest form, the calculation could ordinarily be made by taking the "f.o.b. factory price" for both the sale to the United States and for home consumption.[16]

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[16] The Customs Simplification Act of 1956, Pub.L. 927, 84th Congress, required the Treasury Department to submit a report to Congress with recommendations for amendments considered desirable or necessary to improve enforcement of the Antidumping Act of 1921. Treasury submitted its report to Congress on February 7, 1957, and it was incorporated into the subsequent hearings. See *Report of the Secretary to the Congress on the Operation and Effectiveness of Antidumping Act and on Amendments to the Act Considered Desirable or Necessary;* Hearings before the House Ways &

Treasury also provided examples of typical price comparisons which showed adjustments to both the sales price in the foreign market and for export to the United States relative to inland freight. Furthermore, Treasury's report to Congress explained that where packing charges were an element in the price, an adjustment would be made so that the differences between the charge for home-consumption and the often more expensive charge for export packing would cancel out. Thus, Congress was well advised of the fact that allowances were being made to foreign market value for both inland freight charges and differences in packing costs prior to the enactment of the 1958 amendment. Yet, Congress took no steps to change the Treasury's practice, but proceeded to enact the amendment.

The 1960 Customs regulation, which implemented the 1958 amendment to the Antidumping Act, specifically drew attention (example 7) to the fact that inland freight charges in the home market would be considered as a circumstance of sale and would be taken into account in determining dumping margins. *See* 25 FR 3948, 95 Treas. Dec. 229, 246, T.D. 55118 (1960). In 1979, Congress reenacted the provision for other circumstances of sale (section 773(a)(4)) in substantially the same form as it existed under the Antidumping Act of 1921 (section 202(b) and (c)) without making any exception for inland freight charges and differences in packing costs. Moreover and as previously noted, the legislative history of the Trade Agreements Act of 1979 shows that Congress intended that the law

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Means Committee on H.R. 6006, 6007 and 5120, 85th Cong., 1st Sess. (1957), pp. 11-29. See also Treasury Department "Explanatory Memorandum", *Hearings Before the Senate Committee on Finance on H.R. 6006 to Amend Certain Provisions of the Antidumping Act of 1921*, 85th Cong., 2d Sess. 19 (1958). Said memorandum states: "Other circumstances of sale would be selling costs, restrictions affecting value, commissions, *differences in inland freight costs*, and other items affecting the price of merchandise in one market as compared with another." [Emphasis added.]

be administered consistently with existing administrative precedents (*see S.Rep.No.96-249, supra*, at 106). Also, the Comptroller General's Report to Congress, *supra*, at 25, shows that in comparing prices in the two markets, deductions were made from the prices being compared for inland freight. Hence, as previously observed, Congress must be deemed to have acquiesced in Commerce's administrative practice, which is entitled to great deference. *Zenith* v. *United States, supra*.

SCM, however, advances the argument that the inland freight charge and packing cost adjustments were improper because the statute (section 773(a)(1)) explicitly requires the inclusion in foreign market value of the cost of all containers and coverings and all other costs, charges and expenses incident to placing the merchandise in condition packaged ready for shipment to the United States, but makes no specific provision for an adjustment respecting cost differences. On this basis, SCM reasons that there can be no downward adjustment for inland freight and differences in the cost of packing as "other differences in circumstances of sale" under section 773(a)(4). SCM further argues that an adjustment for differences in packing costs pursuant to section 773(a)(4) renders superfluous the language in section 773(a)(1) requiring that, in determining foreign market value, the transaction price be "increased by, when not included in such price, * * *" the cost of packing. Finally, SCM urges that the granting of the downward adjustment for the differences in packing costs violates the rule that statutory provisions shall be read in *pari materia*.

SCM's arguments must be rejected, since its construction of the statute would render inoperative the provision for adjustments for differences in circumstances of sale and would violate the rule that statutes are to be construed in *pari materia*. Of course, it is correct that under section 773(a)(1) the specified costs, charges and expenses must be included in the basic price of goods when the authority begins the calculation process. But since the statute requires that the basic price be adjusted pursuant to section 773(a)(4) when differences in circumstances of sale exist, obviously the initial prices must be

adjusted to reflect such differences when they are shown to exist. Fundamentally, the statute must be construed as a whole, which embraces the provision for adjustments in section 773(a)(4). These adjustments may be "downward" as well as "upward". Accordingly, if inland freight and/or packing costs are higher for sales made in the home market than in sales to the United States, the home market price should be adjusted downward, relative to the United States price, to reflect the differing circumstances that exist. Of course, the converse would be true if these types of costs were higher for sales to the United States.

Finally, since the administrative record contains evidence of the costs supporting the inland freight and packing adjustments, and since for purposes of making adjustments to foreign market value pursuant to section 773(a)(4) seller's costs are sufficient (see Point II *supra*), the allowances are supported by substantial evidence in the record.

V.

ADJUSTMENT FOR AFTER-SALE REBATES

In its early determination of antidumping duties, Commerce made adjustments to the foreign market value of PETs sold in Japan by Brother and Silver for certain after-sale rebates. 45 FR 53854, 53855. SCM contests the allowance of these rebates as adjustments for differences in circumstances of sale. Specifically, SCM identifies Silver's after-sale volume rebates and Brother's monthly and periodic after-sale rebates as the subject of its attack upon Commerce's allowances for rebates.

SCM contends: first, that the rebates given by Brother and Silver are not "directly related" to the sales under consideration; second, that the values of the various rebates, even if directly related, are not quantifiable; third, that the values upon which the adjustments were granted to Brother and Silver were not based upon actual values, but rather upon "estimates, approximations, or averages," contrary to the holding in *F.W. Myers*; and finally, that the adjustments for

rebates constituted a misapplication of statutory requirements rendering them contrary to law.

We first summarize the pertinent facts established by the administrative record. Silver granted volume rebates to Japanese customers for purchases of targeted quantities of certain Silver typewriters. Commerce's adjustment to foreign market value was calculated on the basis of the expense to Silver in granting these after-sale volume rebates to two domestic purchasers—Company A and Company B.

The rebates granted by Silver to Company A and Company B were for the sale of manual and electric typweriters, and as to Company B, included an additional rebate for the sale of cash registers. In order to determine the rebate expenses attributable to sales of Pets, Commerce initially computed the ratio of total PET sales in yen to the total yen amount of all sales subject to the rebate program for Company A and Company B. Multiplying this percentage by the total rebate amount granted to companies A and B individually resulted in the two "total-volume amount" figures (one for Company A and one for Company B), representing total PET rebates paid each. Commerce then computed the percentage of PET sales attributable to each relevant model on the basis of volume of sales in yen, and multiplied each of these percentages by the yen amount of rebates granted to each company for PETs. This calculation gives the yen amount of rebates for all sales of each particular model PET which, when divided by quantity sold, gives the rebate per unit allowed as an adjustment to foreign market value.

Turning to Brother's rebates, as noted above SCM has challenged two types (monthly and periodic) which Commerce allowed as adjustments to the foreign market values of Brother's PETs. The monthly rebate was granted to three classes of purchasers: Franchised Office Equipment Dealers, Franchised Dealers selling other Brother products, and University Co-op Stores (hereinafter referred to as "Franchised Dealers", "Other Dealers" and "Co-op Stores", respectively).

For Franchised Dealers and Other Dealers, the rebate was a fixed yen amount per unit, which was determined by the number of purchases of all typewriters (manual and electric). For the Co-op Stores the rebate was a percentage of the total yen volume of purchases of all portable electric typewriters. Since the rebate for Franchised Dealers and Other Dealers was a fixed yen amount per unit, the rebate was computed by dividing the total yen expense incurred for the program by the number of typewriters sold (manual and electric). For the Co-op Stores, a different calculation was utilized. Since the actual amount of rebates paid by Brother was based on a percentage of total PET sales volume, Commerce allocated the expense among the various models according to the comparative sales amount of each model, and then divided by the number of units of each model sold.

The second rebate program challenged by SCM involves the periodic rebate, granted only to the Franchised Dealers. That rebate was a fixed yen amount, determined by the total number of typewriters (manual and electric) purchased during a six-month period; and the per unit expense was calculated by dividing the total amount incurred for this program by the number of units sold during the six-month time period.

SCM's argument that Silver's rebates were not directly related to the sales under consideration is premised upon three grounds: (1) the rebate program was not based upon "particular sales", but total sales, and hence the payments were not "rebates" but rather general "goodwill expenditures"; (2) the rebate program was conducted over a period of time which did not exactly coincide with the time period of the investigation, and therefore, sales other than those under consideration were included in the calculation, thus negating any direct relationship; and, (3) the statute requires that foreign market value shall reflect home market prices at the time of exportation of the merchandise to the United States so that after-sales volume rebates do not qualify as an adjustment.

With respect to Brother's rebates, SCM attacks only the fact that the rebates were based upon total sales and not particular

sales. Accordingly, my comments on this aspect of the rebates are equally applicable to both Silver's and Brother's rebates.

Initially, we consider SCM's argument that allowances were improperly granted by Commerce for the rebates because they were not "directly related" to the home market sales under consideration.

I am unable to agree with SCM's position. The fact that rebates were granted on the predicate of total sales of PETs, manual typewriters and cash registers does not negate the direct relationship of the rebates to sales of any one line of Silver products. The amount of rebates attributable to each of the different products was accurately quantifiable as a percentage of the total yen volume amount of all of the involved products, and the per unit (by model) rebate amount was just a matter of simple arithmetical calculation.

Congress intended that adjustments to "foreign market value" should be permitted if they are reasonably quantifiable and directly related to the sales under consideration. Thus, the *House report* states:

> The Committee intends that adjustments should be permitted if they are reasonably identifiable, quantifiable, and directly related to the sales under consideration and if there is clear and reasonable evidence of their existence and amount.

H.Rep.No.96-317, 96th Cong., 1st Sess., p. 76 (1979).

Here, the challenged rebates for PETs are clearly identifiable, easily quantifiable, and there is substantial evidence of their existence and amount.

SCM alleges that because the rebate amounts per unit are predicated upon volume sales over a period of time different from, but including, the period of time subject to the investigation, they were impermissibly based upon sales not under consideration, and therefore are not directly related to the sales under consideration. This contention is without merit. The fact that rebates to be given at the end of a certain period, for certain items, can only be ascertained at the end of that

period, does not nullify the direct relationship between the end-of-period rebate and the sales throughout that period. The end-of-period rebate represents an actual (not an approximate, estimated, or averaged) reduction in the selling prices, and is directly attributable to the total of all the individual typewriter sales, with each individual typewriter accounting for an allocable portion of the total rebate. Accordingly, the PET rebates are directly related to the sales here under consideration.

SCM also points to the language in 19 U.S.C. § 1677b(a)(1) that "[t]he foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States—* * *", and contends that this language precludes consideration of the after-sale rebates, even if they ultimately reduce the actual price of the merchandise. I am unable to agree with that interpretation: it ignores the statutory directive in § 1677b(a)(4) that, in determining foreign market value, allowance shall be made for differences in circumstances of sale and Congressional intent that adjustments be made in order to achieve comparability between the prices being compared. *S.Rep. No.96-249, 96th Cong., 1st Sess., p. 94 (1979).* Whether the purchaser receives a price discount at the time of sale or an after-sale rebate, the substance of the transaction is the same, and a fair price comparison must take the price reduction into account.

Quoting from *F.W. Meyers*, SCM argues that "a basic concept of all value determinations by the court is that they must be based upon proof of *actual* costs or prices—*not* estimates, approximations or averages." (Emphasis copied.) 72 Cust.Ct. at 234. Clearly, this *F.W. Meyers* teaching does not preclude the administering authority from allocating or apportioning *actual* costs among the various items to which they are attributable. For example, determination of a per-unit price after deduction for freight and packing cannot be made without allocations. Where a company pays freight or packing charges quarterly or monthly, such charges must be allocated to individual sales. Where a charge is spread across sales of more than one unit, it must be allocated to individual sales or the per-unit price will not reflect the charges. The same is true for rebates.

In brief, the rebate adjustments were not approximations or estimates, but allocations derived from an actual total rebate amount. So long as the foreign market value reflects actual net selling prices to the purchasers on the date of exportation to the United States, which are known at the time Commerce conducts its antidumping duty investigation, the objectives of 19 U.S.C. § 1677b(a)(4) are satisfied. Hence, the adjustments for rebates granted to Brother and Silver are in compliance with the statutory criteria, Congressional intent, and are supported by substantial evidence.

VI.

THE ADJUSTMENT TO FOREIGN MARKET VALUE FOR ADVERTISING EXPENSES

Commerce's early determination of antidumping duties allowed an adjustment to the foreign market value of Brother's PETs under 19 CFR § 353.15(b) for certain advertising expenses incurred by Brother in the home market. 45 FR 53853, 53855 (1980). This regulation pertains to the circumstances of sale provision and provides for an adjustment to foreign market value for advertising and other selling expenses assumed by a seller that are attributable to a later sale by a purchaser.

SCM contends that the advertising expense adjustments lack the requisite "direct relationship" to the particular sales under consideration because: (1) the adjustments covered general office expenses; (2) the adjustments were based upon advertising of multiple product lines; and (3) the adjustments were grounded upon advertising which was calculated to enhance Brother's corporate image rather than to promote specific sales. In addition, SCM challenges the apportionment of the advertising expenses among the various PET models, maintaining that the allocation was based upon "estimates", contrary to *Myers*.

Regarding the claim for direct advertising expenses, Commerce determined that most, but not all, of the expenses claimed by Brother were appropriate for adjustment. However, Commerce rejected the methodology utilized by

Brother, based upon space apportionments (except in one advertisement), in calculating the per model adjustment, and instead utilized a method of allocation based upon a "yen volume amount of sales" percentage. Brother, however, does not contest the calculation methodology utilized by Commerce.

I have carefully reviewed the method used by Commerce in determining the adjustments for advertising expenses, and I see nothing in the administering authority's method of calculation or apportionment of expenses that is unreasonable or unrelated to the sales under consideration.

SCM argues that "[t]o the extend general office expenses (salaries, overhead expenses and the like) were included in the adjustment for 'certain advertising expenses', the ITA's [Commerce's] action was improper, since such expenses are not directly related to the sales under consideration * * *". Defendant and Brother contend that the general office expenses were considered by Commerce as indirect expenses adjustable in accordance with the ESP offset.

I find that the "general office expenses (salaries, overhead expenses and the like)" were not included in the adjustments made for direct advertising expenses, but rather, such general office expenses were correctly allowed as part of the ESP offset, as claimed by defendant and Brother. Commerce's antidumping duty determination, 45 FR 53853 (1980), stated the following with regard to the basis of comparison utilized in assessing Brother's dumping duties:

> **2. Foreign Market Value Compared To Purchase Price.**
>
> * * * * * *
>
> Adjustments to foreign market value were made for differences in circumstances of sale in accordance with section 773(a)(4)(B) of the Act . . . and § 353.15 of the Commerce Regulations (19 CFR 353.15, 45 FR 8194). Section 353.15(a) of the Regulations provides for adjustment to foreign market value for differences in circumstances of sales which bear a direct relationship to the sales which are under consideration. Section 353.15(b) provides for

> adjustments to foreign market value for advertising and other selling expenses assumed by the seller that are attributable to a later sale by the purchaser. We have determined that adjustment to foreign market value is warranted for Brother for . . . certain types of *direct* advertising expenses. [Emphasis added.] 45 FR at 53854-53855.

Thus, it appears that in comparing the foreign market value with purchase price for Brother's PETs, Commerce specifically limited the adjustment to foreign market value to those *direct* advertising expenses assumed by Brother and attributable to a later sale by the purchaser. Consequently, the only expenses allowed for advertising were those attributable to the various invoices submitted by Brother, covering each of the advertisements for which adjustments were claimed.

In contesting the "direct relationship" of Brother's direct advertising expenses to the particular sales under consideration, SCM insists that advertisements run during February 1980 must necessarily be related to sales to Brother's customers in the fourth quarter of 1979 on the assumption that Brother's customers would have placed their orders for the merchandise to be advertised at some date sufficiently to be advertised at some date sufficiently in advance of the advertisement to permit the receipt of the merchandise at their warehouse or store before the advertisement was run. So, according to SCM, if Brother's advertising expenditures were "directly related" to any PET sales, they were related to purchases made in the fourth quarter of 1979, and were not directly related to the sales under consideration, which sales occurred in the January-May 1980 time period.[17] While *some* lead time is obviously necessary for Brother's purchasers to receive the particular typewriters under consideration in Com-

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[17] Defendant concedes that Brother must advertise directly to its purchasers customers to qualify as an assumption of advertising expenses attributable to a later sale under 19 CFR § 353.15(a) and (b), as claimed by SCM.

merce's investigation, there is no intimation in the record of the amount of lead time required in Brother's Japanese distribution process. Hence, Commerce's adjustments for advertising expenses incurred in February 1980 may not be assumed to be improper, and to the contrary, are presumptively correct.

SCM argues further that the "direct relationship" of the advertising expenses to the sales under consideration is abrogated regarding those advertisements which included products other than PETs (*i.e.*, manual typewriters). In support of this argument, SCM cites *Motorcyles from Japan*, 43 FR 35140, 35141 (1978). There, advertising expenses were allowed by Treasury as adjustments to foreign market value in those instances where a reasonable allocation of advertising expenses among various types of motorcycles was established. Here, Commerce accepted Brother's allocation method as a reasonable apportionment of advertising expenses among the two types of typewriters (manual and electric). Then, after rejecting Brother's further model-by-model allocation based upon space, Commerce utilized the identical method of allocation used in the *Motorcycles* case, *i.e.*, value of sales of each relevant PET model.

Plainly, an advertisement covering both PETs and manual typewriters is "directly related" to sales of the models advertised; and since Commerce permitted a reasonable allocation of advertising expenses between the electric and manual typewriters, Commerce properly adjusted the foreign market value of Brother's PETs for directly related advertising expenses in accordance with 19 U.S.C. § 1677b(a)(4)(B) and 19 CFR § 353.15(b). Moreover, inasmuch as the allocation of advertising expenses was bottomed upon actual verified costs apportioned on a rational basis, Commerce did not contravene the *F.W. Myers* proscription of estimates or approximations.

SCM also attacks Commerce's allowance of adjustments to foreign market value of Brother's PETs for advertising expenses on the ground that some of the advertisements made

reference to Brother's commemoration of the production of its ten millionth typewriter, and therefore such advertisements were merely promoting Brother's corporate image. But those references do not constitute merely a "general image campaign", as urged by SCM. Here, each of the advertisements in question refers specifically to Brother's typewriters, either by words or by actual pictures. A "general image campaign", on the other hand, is more in the nature of making consumers aware of the company's concern for consumers and the quality of its workmanship and product in general, but do not tout a specific product.[18] Where, as here, the particular product in question (*i.e.*, typewriters) is the sole subject of the advertisement, such advertisement does not lose its direct relationship to the sales of that product under consideration. While the advertisements also mention a giveaway program whereby purchasers of Brother typewriters would receive a free transistor radio, that program obviously was intended to entice customers to purchase a Brother typewriter.

In short, each of the twelve advertisements for which adjustments were allowed by Commerce as direct advertising expenses was financed entirely by Brother and aimed specifically at ultimate consumers, *viz.*, the "later sales" that Brother's purchasers hoped to transact. As such, the adjustments were made in accordance with section 353.15(b) of the regulations, and fully complied with the statutory requirement that adjustments be made for "differences in circumstances of sale." Further, in light of the fact that the adjustment to the foreign market value of Brother's PETs for advertising expenses is predicated upon actual costs, and because each ex-

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[18] Defendant cites a good example of a "general image campaign" type advertisement commonly seen in the United States today. Thus, in an oil company advertisement (frequently characterized as a "public message") a commentator discusses the environmentally sound means by which new oil discovery and production are being achieved by the advertising oil company, and how the world will be safe and well provided for in generations to come, but rarely, if ever, mentions any specific product.

pense is identifiable and quantifiable on a per unit basis (by model), grounded upon a reasonable allocation method, the adjustment was proper.

VII.

THE ADJUSTMENT TO FOREIGN MARKET VALUE FOR THE COST OF MATERIALS AND LABOR OF CERTAIN ACCESSORIES AND PRINTED MATERIALS

Commerce's early determination of antidumping duties allowed an additional adjustment to foreign market value for a number of items which, it determined, constituted differences in physical characteristics of the PETs being compared pursuant to Section 773(a)(4)(C) and 19 CFR § 353.16, limited to the difference in cost of materials and labor. SCM challenges the allowance regarding certain accessories (principally typewriter ribbons and cassettes) and printed materials (*i.e.*, instruction manuals) furnished by Brother relating to sales of PETs.

SCM advances the argument that since the "merchandise" in this case consists of PETs, the accessories and literature are not physical characteristics of the portable electric typewriters in the markets being compared, and therefore, no adjustment is warranted for the claimed differences in accessories and printed materials.

I hold that SCM's interpretation unduly restricts the scope of the term "merchandise" in 19 CFR § 353.16 because such interpretation ignores the fact that imported merchandise may include accessories and/or manuals which are used in conjunction with the principal article being sold. In the instant case, the merchandise sold in Japan comprised PETs with certain accessories and a large-size pamphlet including a text on how to type, while the merchandise sold for export to the United States consisted of PETs without accessories and with a small-size pamphlet which did not include a textbook on how to type. By consequence, there was an obvious difference in physical characteristics between the product sold in Japan (PETs with accessories and a large-size pamphlet containing a textbook on

how to type) and the product sold for export to the United States (PETs without the particular accessories and with a small-size pamphlet which did not include a textbook on how to type). Inasmuch as there were differences in the physical characteristics of the merchandise sold in Japan vis-a-vis the merchandise sold for export to the United States, Commerce properly allowed an adjustment to foreign market value for the difference in cost of labor and materials.

VIII.

BROTHERS CLAIMED ADJUSTMENT FOR EXPENSES OF TRANSISTOR RADIO GIVE-AWAY PROGRAM

As we have seen, Commerce made adjustments to foreign market value for certain advertising expenses incurred by Brother. As part of its advertising expenses, however, Brother claimed a further adjustment for the expense of transistor radios given away as part of its commemoration activities promoting the sale of Brother's ten millionth typewriter. These expenses were disallowed by Commerce in its early determination of antidumping duties. 45 FR 53853, 53855 (1980). As also noted, *supra*, Brother has filed a cross-motion for summary judgment contending that the promotional expenses should have been allowed as an adjustment to foreign market value. Brother's cross-motion is opposed by SCM and the Government.

Commerce disallowed the claimed adjustment for the promotional expenses on the ground that the information submitted by Brother as to the number of radios purchased by Brother and the number of typewriters (PETs and manuals) sold during the period of investigation did not correspond.

Commerce's disallowance of the promotional expenses as an adjustment to foreign market value is sustained. The record fails to establish the numerical relationship between the number of transistor radios purchased by Brother and the number of radios actually given away during the period of the investigation. Factually, the record even fails to show that the

transistor radios had, during the period of the investigation, been distributed by Brother to its purchasers for dissemination. As claimed by the government, it appears that the verified information as to the number of radios purchased by Brother and the number of typewriters sold during the period of investigation did not correspond. Stated differently, Commerce was not satisfied that all purchasers of Brother typewriters actually received the give-away radios. Under these circumstances, Commerce properly disallowed an adjustment to the claimed promotional expenses to the foreign market value. Brother's cross-motion for summary judgment is therefore denied insofar as it challenges Commerce's disallowance of an adjustment for Brother's promotional give-away expenses.

IX.

CONCLUSION

In summary, I have carefully considered the excellent briefs and oral arguments of counsel for the parties[19] and have concluded that the regulations followed by Commerce in making the adjustments to foreign market value challenged by SCM do not frustrate the Congressional policy underlying the antidumping law. If, as this Court believes, a fair and equitable comparison of the United States price and the foreign market value is the ultimate goal of the statutory adjustment for differences in circumstances of sale, the regulations attacked by SCM are reasonable, effectuate the Congressional scheme, and were prosperly applied by Commerce, the administering authority, under the facts and circumstances in this case.[20]

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[19] It will bear repetition to express the Court's sincere appreciation for counsel's "superb arguments" and to reiterate that counsel "have all acted in the highest traditions of our profession" (Tr. Oral Arg., 139-40).

[20] Silver points out that the dumping margins found by Commerce in its original fair value investigation include the adjustments made to foreign market value pursuant to 19 CFR § 353.15(c), and (d) predicated upon the ESP offset and the cost of the differences in

Brother's claimed adjustment for the promotional give-away program must fail for lack of the necessary proof of entitlement.

I find no issue of material fact as to which there is a genuine dispute, and conclude that the Government is entitled to summary judgment as a matter of law with respect to all claims asserted by SCM and Brother. Accordingly, it is hereby ordered:

1. that the early determination of antidumping duties by Commerce published on August 13, 1980 is affirmed in all respects;

2. that SCM's motion for summary judgment is denied;

3. that the Government's cross-motion for summary judgment is granted;

4. that Brother's cross-motion for summary judgment is denied insofar as it challenges Commerce's disallowance of an adjustment to foreign market value for Brother's promotional give-away expenses; Brother's cross-motion for summary judgment is granted insofar as Brother seeks to sustain the early determination of antidumping duties, as that determination relates to Brother's PETs;

5. that Silver's cross-motion for summary judgment sustaining the early determination of antidumping duties as that determination relates to Silver's PETs is granted.

It is further ORDERED that the United States Customs Service shall liquidate all entries, the liquidation of which have

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circumstances of sale, which adjustments are now challenged by SCM for the first time when made in the early determination of antidumping duties. Hence, argues Silver, if Commerce's decision under section 736 (the early determination of antidumping duties) is illegal or improper, the results of the original fair value investigation are also illegal or improper. However, in view of the conclusions reached in this case, it is unnecessary to address this issue.

been suspended pursuant to this Court's order of December 30, 1980, 1 CIT ____, Slip Op. 80-17, 507 F.Supp. 1015 (1980), in the amounts specified in Commerce's early determination of antidumping duties.

The foregoing constitutes the decision and order of the Court.

APPENDIX C

"SEC. 772 UNITED STATES PRICE. [19 USC 1677a]

"(a) UNITED STATES PRICE.—For purposes of this title, the term 'United States price' means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.

"(b) PURCHASE PRICE.—For purposes of this section, the term 'purchase price' means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from the manufacturer or producer of the merchandise for exportation to the United States. Appropriate adjustments for costs and expenses under subsection (d) shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.

"(c) EXPORTER'S SALES PRICE.—For purposes of this section, the term 'exporter's sales price' means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, as adjusted under subsections (d) and (e).

"(d) ADJUSTMENTS TO PURCHASE PRICE AND EXPORTER'S SALES PRICE.—The purchase price and the exporter's sales price shall be adjusted by being—

"(1) increased by—

"(A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States,

"(B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States,

"(C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the

extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and

"(D) the amount of any countervailing duty imposed on the merchandise under subtitle A of this title or section 303 [19 USC 1303] of this Act to offset an export subsidy, and

"(2) reduced by—

"(A) except as provided in paragraph (1)(D), the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and

"(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the country of exportation on the exportation of the merchandise to the United States other than an export tax, duty, or other charge described in section 771(6)(C).

"(e) ADDITIONAL ADJUSTMENTS TO EXPORTER'S SALES PRICE.—For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

"(1) commissions for selling in the United States the particular merchandise under consideration.

"(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and

"(3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

"SEC. 773. FOREIGN MARKET VALUE. [19 USC 1677b]

"(a) DETERMINATION: FICTITIOUS MARKET; SALES AGENCIES.—For purposes of this title—

"(1) IN GENERAL.—The foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States—

"(A) at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption, or

"(B) if not so sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States,

increased by, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of importation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

"(2) USE OF CONSTRUCTED VALUE.—If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that merchandise, as determined under subsection (e).

"(3) INDIRECT SALES AND OFFERS FOR SALE.—If such or similar merchandise is sold or, in the absence of sales,

offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 771(13), the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value.

"(4) OTHER ADJUSTMENTS.—In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—

"(A) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale, for exportation to, or in the principal markets of, the United States, as appropriate, in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale, in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold for home consumption, then for exportation to countries other than the United States);

"(B) other differences in circumstances of sale; or

"(C) the fact that merchandise described in paragraph (B) or (C) of section 771(16) is used in determining foreign market value.

then due allowance shall be made therefor.

"(b) SALES AT LESS THAN COST OF PRODUCTION.—Whenever the administering authority has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the

administering authority determines that sales made at less than cost of production—

"(1) have been made over an extended period of time and in substantial quantities, and

"(2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade,

such sales shall be disregarded in the determination of foreign market value. Whenever sales are disregarded by virtue of having been made at less than the cost of production and the remaining sales, made at not less than cost of production, are determined to be inadequate as a basis for the determination of foreign market value under subsection (a), the administering authority shall employ the constructed value of the merchandise to determine its foreign market value.

"(c) STATE-CONTROLLED ECONOMIES.—If available information indicates to the administering authority that the economy of the country from which the merchandise is exported is State-controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of foreign market value under subsection (a) of this section, the administering authority shall determine the foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either—

"(1) the prices, determined in accordance with subsection (a) of this section, at which such or similar merchandise of a non-State-controlled-economy country or countries is sold either—

"(A) for consumption in the home market of that country or countries, or

"(B) to other countries, including the United States; or

"(2) the constructed value of such or similar merchandise in a non-State-controlled-economy country or countries as determined under subsection (e).

"(d) SPECIAL RULE FOR CERTAIN MULTINATIONAL CORPORATIONS.—Whenever, in the course of an investigation under this title, the administering authority determines that—

"(1) merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm or corporation which also owns or controls, directly or indirectly, other facilities for the production of such or similar merchandise which are located in another country or countries;

"(2) the sales of such or similar merchandise by the company concerned in the home market of the exporting country are nonexistent or inadequate as a basis for comparison with the sales of the merchandise to the United States; and

"(3) the foreign market value of such or similar merchandise produced in one or more of the facilities outside the country of exportation is higher than the foreign market value of such or similar merchandise produced in the facilities located in the country of exportation,

it shall determine the foreign market value of such merchandise by reference to the foreign market value at which such or similar merchandise is sold in substantial quantities by one or more facilities outside the country of exportation. The administering authority, in making any determination under this paragraph, shall make adjustments for the difference between the costs of production (including taxes, labor, materials, and overhead) of such or similar merchandise produced in facilities outside the country of exportation and costs of production of such or similar merchandise produced in the facilities in the country of exportation, if such differences are demonstrated to its satisfaction. For the purposes of this subsection, in determining foreign market value of such or similar merchandise produced in a country outside of the country of exportation, the administering authority shall determine its price at the time of exportation from the country of exportation and shall make any adjustments required by subsection (a) of this section for the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the

United States by reference to such costs in the country of exportation.

"(e) CONSTRUCTED VALUE.—

"(1) DETERMINATION.—For the purposes of this title, the constructed value of imported merchandise shall be the sum of—

"(A) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

"(B) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, except that—

"(i) the amount for general expenses shall not be less than 10 percent of the cost as defined in subparagraph (A), and

"(ii) the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost; and

"(C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the United States.

"(2) TRANSACTIONS DISREGARDED; BEST EVIDENCE.—For the purposes of this subsection, a transaction directly or indirectly between persons specified in any one of the subparagraphs in paragraph (3) of this subsection may be disregarded if, in the case of any element of value required to be considered, the

amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available as to what the amount would have been if the transaction had occurred between persons not specified in any one of the subparagraphs in paragraph (3) of this section.

"(3) RELATED PARTIES.—The persons referred to in paragraph (2) of this subsection are:

"(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

"(B) Any officer or director of an organization and such organization.

"(C) Partners.

"(D) Employer and employee.

"(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.

"(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

"(f) AUTHORITY TO USE SAMPLING TECHNIQUES AND TO DISREGARD INSIGNIFICANT ADJUSTMENTS.—For the purpose of determining foreign market value under this section, the administering authority may—

"(1) use averaging or generally recognized sampling techniques whenever a significant volume of sales is involved or a significant number of adjustments to prices is required, and

"(2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.

APPENDIX D

§ 353.15 Differences in circumstances of sale.

(a) *In general.* In comparing the United States price with the sales, or other criteria applicable, on which a determination of foreign market value is to be based, reasonable allowances will be made for bona fide differences in the circumstances of the sales compared *to the extent* that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences. Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration.

(b) *Examples.* Examples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and *assumption by a seller* of a *purchaser's* advertising or other selling costs. Reasonable allowances also generally will be made for differences in commissions. Allowances generally will not be made for differences in advertising and other selling costs of a seller, unless such costs are attributable to a later sale of the merchandise by a purchaser.

(c) *Special rule.* Notwithstanding the criteria for adjustments for differences in circumstances of sale set forth in paragraphs (a) and (b) of this section, reasonable allowances for other selling expenses generally will be made in cases where a reasonable allowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual other selling expenses incurred in the one market, or the total amount of the commission allowed in such other market, whichever is less. In making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market.

(d) *Determination of allowances.* In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such differences to the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise.

APPENDIX E

19 CFR PART 353

Portable Electric Typewriters From Japan; Antidumping Duty Order

Agency: U.S. Commerce Department.

Action: Antidumping Duty Order.

Summary: This notice is to inform the public that separate investigations conducted under the Antidumping Act, 1921, and its superseding legislation, the Tariff Act of 1930, as amended, by the Commerce Department, the Treasury Department and the United States International Trade Commission have resulted in determinations that portable electric typewriters from Japan are being sold at less than fair value and that these sales are materially injuring an industry in the United States. All unappraised entries of this merchandise made on and after January 4, 1980, the date on which liquidation was suspended, will be liable for the possible assessment of special dumping duties. Deposits of estimated antidumping duties shall be required of all entries made on and after the date of publication of this antidumping duty order in the Federal Register.

Effective Date: May 9, 1980.

For Further Information Contact: Steven Lim, Office of Investigations, International Trade Administration, U.S. Commerce Department, 14th St. and Constitution Ave., NW., Washington, D.C. 20230. Telephone: (202) 377-1776.

Supplementary Information: Section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)) gave the Secretary of the Treasury responsibility for determining whether imported merchandise is being sold at less than fair value. Pursuant to that authority, the Secretary of the Treasury tentatively determined that portable electric typewriters from Japan are being sold at less than fair value within the meaning of section 201(a) of the Antidumping Act of 1921 (19 U.S.C. 160(a)). (Published in the Federal Register of January

4, 1980 (45 FR 1220-2)). Pursuant to section 102(b)(2) of the Trade Agreements Act of 1979 (93 Stat. 189, 19 U.S.C. 1671) the tentative determination of the Secretary of the Treasury under the 1921 Act was treated as a preliminary determination under section 733(b) of the Tariff Act of 1930, as amended (93 Stat. 163, 19 U.S.C. 1673b(b)) ("the Act"). Pursuant to section 735(a) of the Act (93 Stat. 169, 19 U.S.C. 1673d(a)), the Administering Authority made a final determination that portable electric typewriters from Japan are being sold at less than fair value. (Published in the Federal Register of March 21, 1980 (45 FR 18417-8)).

Section 735(b) of the Act (93 Stat. 170, 19 U.S.C. 1673d(b)), gives the United States International Trade Commission responsibility for determining whether by reason of such sales at less than fair value a domestic industry is being or is likely to be materially injured. The Commission has determined, and on May 1, 1980, it notified the Secretary of Commerce that an industry in the United States is materially injured by reason of the importation of portable electric typewriters from Japan that are being sold at less than fair value within the meaning of the Act.

In accordance with section 736 of the Act (93 Stat. 172, 19 U.S.C. 1673e), Customs officers are directed to assess an antidumping duty equal to the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise for all entries subject to the "Withholding of Appraisement" notice published in the Federal Register on January 4, 1979 (45 FR 1220-2) and all future entries until further notice. On or after the date of publication of this notice, Customs officers shall require, at the same time as estimated normal customs duties on the merchandise are deposited, a deposit of estimated antidumping duties pending liquidation of entries of the subject merchandise on all entries, or withdrawals from warehouse, for consumption. Deposits shall be collected in the following amounts: Nakajima All: 4.36 percent *ad valorem;* Silver Seiko: 36.53 percent *ad valorem;* Brother Industries: 48.70 percent *ad valorem;* for any other

exporters of the subject merchandise: 37.12 percent *ad valorem*.

I hereby make public these determinations, which constitute an antidumping duty order with respect to portable electric typewriters from Japan.

For the purposes of this notice, the term "portable electric typewriters" are those provided for in item 676.0510, Tariff Schedules of the United States Annotated.

Accordingly, Annex I, Part 353 of the Commerce Regulations (19 CFR Part 353, 45 FR 8208) is being amended by adding the following to the list of antidumping duty orders currently in effect:

Merchandise	Country	Treasury decision
Portable electric typewriters	Japan ____	(45 FR____)

(Section 736 of the Act (93 Stat. 172, 19 U.S.C. 1673e) and Section 353.48 of the Department of Commerce Regulations (19 CFR 353.48, 45 FR 8204))

John D. Greenwald

Deputy Assistant Secretary for Import Administration.

May 6, 1980.

[FR Doc. 80-14388 Filed 5-8-80: 8:45 am]

Billing Code 3510-22-M

APPENDIX F

PORTABLE ELECTRIC TYPEWRITERS FROM JAPAN; ANTIDUMPING; DETERMINATION OF DUTY

Agency: U.S. Department of Commerce.

Action: Early determination of antidumping duties.

Summary: This notice is to advise the public that pursuant to section 736(c) of the Tariff Act of 1930, as amended (93 Stat. 173, 19 U.S.C. 1673e(c)) the Department of Commerce has determined the amount of antidumping duties to be assessed upon the importation of portable electric typewriters from Japan manufactured by Brother Industries Ltd. (Brother) and Silver Seiko Ltd. (Silver Seiko). Portable electric typewriters produced by these two companies and entered or withdrawn from warehouse on or after January 4 to May 7, 1980, will be assessed antidumping duties in accordance with this determination. This determination will also be the basis for the deposit of estimated antidumping duties on future entries of typewriters produced by Brother and Silver Seiko.

Effective Date: August 13, 1980.

For Further Information Contact: Steven S. Lim, Office of Investigations, Import Administration, U.S. Department of Commerce, Room 2124, N.W., Washington, D.C. 20230, telephone (202) 377-1776.

SUPPLEMENTARY INFORMATION:

A. Procedural Background

On May 9, 1980, an Antidumping Duty Order was published in the **Federal Register** covering imports of portable electric typewriters from Japan (45 FR 30618 and 30619). In accordance with that Order Customs officers were directed to require a deposit of estimated antidumping duties pending liquidation of entries of the portable typewriters subject to the Order for all entries, or withdrawals from warehouse, for consumption. On May 14 and 15, 1980, two manufacturers of these typewriters (Brother Industries, Ltd. and Silver Seiko, Ltd.) re-

quested that the deposit of estimated duties be waived and an early determination of duty be made. Section 736(c) of the Act (93 Stat. 173, 19 U.S.C. 1673e(c), provides that if we are satisfied as to our ability to determine the foreign market value and the United States price for all of the merchandise which was entered between the date of our preliminary affirmative determination and the International Trade Commission's final determination, within 90 days of the date the Antidumping Order was published, we may permit the posting of bond or other security in lieu of the deposit of estimated antidumping duties.

On May 30, 1980 the Department announced that it was satisfied that it would be able to determine foreign market value and United States Price for all entries of typewriters manufactured by Brother and Silver Seiko, during the relevant time period. Deposit of estimated duty was waived in lieu of security pending the early determination.

B. Scope Of The Investigation

All imports of portable electric typewriters produced by Brother and Silver Seiko entered, or withdrawn from warehouse, for consumption, during the period from January 4 to May 7, 1980 were investigated. For the purposes of this determination, the term "portable electric typewriters" means those provided for in item 676.0510, Tariff Schedules of the United States Annotated.

C. Basis Of Comparison—Silver Seiko

For purposes of this determination, the basis of comparison was between purchase price or exporter's sales price, as appropriate, and the adjusted foreign market value of such or similar typewriters on all imports of portable electric typewriters manufactured by Silver Seiko. Purchase price, as defined in section 772(b) of the Tariff Act of 1930, as amended (93 Stat. 181, 19 U.S.C. 1677a(b)), was used for those shipments to the U.S. where the sales were made to unrelated U.S. customers. Exporter's sales price, as defined in section 772(c) of the Act

(93 Stat. 181, 19 U.S.C. 1677a(c)), was used for those sales by Silver Seiko to a U.S. firm related to it within the meaning of section 771(13) of the Act (93 Stat. 180, 19 U.S.C. 1677(13)). Foreign market value was determined in accordance with section 773 of the Act (93 Stat. 182, 19 U.S.C. 1677b).

1. *Purchase Price.* Purchase price was calculated on the basis of f.o.b. packed price to the United States, with deductions for inland freight and handling charges. Silver Seiko's selling price to one of its U.S. purchasers was subject to an exchange rate agreement.

Generally, this agreement provides for an adjustment to the selling price of the merchandise to account for fluctuations in the exchange rate. The net selling price, after adjustment for exchange rate fluctuations in accordance with the agreement, was used for sales involving this U.S. purchaser.

2. *Foreign Market Value Compared to Purchase Price.* The foreign market value compared to purchase price for Silver Seiko was calculated on the basis of sales in the home market as of the date the imported typewriters were purchased or agreed to be purchased. Foreign market value was based on the net sales price to the purchasers who purchased in large wholesale quantities, taking into account volume discounts. Adjustment to foreign market value was made for differences in Japanese inland freight. In accordance with Section 773(a)(4)(B) of the Act (93 Stat. 183, 19 U.S.C. 1677b(a)(4)(B)) and § 353.15 of the Commerce Regulations (19 CFR 353.15, 45 FR 8194), an adjustment to foreign market value was made for differences in packing costs incurred in sales in the home market and the United States.

Pursuant to section 773(a)(4)(C) of the Act, adjustments to foreign market value were made for differences in physical characteristics of the merchandise being compared. In accordance with section 353.16 of the Commerce Regulations, adjustments were limited to differences in cost of production of the typewriters (i.e., cost of materials and labor).

3. *Exporter's Sales Price.* Exporter's sales price was calculated for Silver Seiko on the basis of the selling price to unrelated U.S. dealers, with deductions for Japanese inland freight, handling charges, ocean freight, brokerage, U.S. inland freight, delivery costs, insurance, commissions, advertising and selling expenses.

4. *Foreign Market Value Compared to Exporter's Sales Price.* Foreign market value compared to exporter's sales price was calculated on the basis of sales to retailers for resale in the home market at the time of exportation of the portable electric typewriters to the United States. Adjustment to foreign market value was made for differences in Japanese inland freight expenses.

Three general categories of adjustments were granted for differences in circumstances of sale. Pursuant to §§ 353.15(a) and 353.15(b) of the Commerce Regulations, adjustments were made to foreign market value for differences in circumstances of sale which bore a direct relationship to the sales under consideration or advertising and other selling expenses assumed by the seller attributable to a later sale by the purchaser. Adjustments were made for certain advertising expenses, warranty and after sales service, packing costs and after sale rebates.

Silver Seiko incurred commission expenses in the United States but not in Japan. Section 353.15(c) of the Commerce Regulations provides, in part:

> * * * reasonable allowances for other selling expenses will be made in cases where a reasonable allowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual other selling expenses incurred in one market, or the total amount of the commission, whichever is less.

The "other selling expenses" referred to in the quoted language of the Regulation refers to selling expenses other than those found to be directly related or attributable to a later sale

by a purchaser of the merchandise under consideration. For Silver Seiko, adjustment to foreign market value was made for "other selling expenses" incurred in the home market, not exceeding the total amount of the commissions in the United States. Section 353.15(c) of the Commerce Regulations also provides for adjustment to foreign market value in the case of exporter's sales price transactions for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States. This adjustment is frequently referred to as the exporter's sales price offset. Certain types of advertising expenses which are not appropriate for adjustment under § 353.15(a) or (b) of the Regulations have been included in the total amount of other actual selling expenses incurred in the home market subject to the exporter's sales price offset. Adjustment to foreign market value has been made for Silver Seiko up to the amount of the non-directly related selling expenses incurred in the United States since such expenses were less than the non-directly related selling expenses incurred in Japan.

Pursuant to section 773(a)(4)(C) of the Act, adjustments to foreign market value were made for differences in physical characteristics of the typewriters being compared. In accordance with sections 353.16 of the Commerce Regulations, adjustments were limited to differences in the cost of production of the typewriters (i.e., cost of materials and labor).

5. *Claims for Adjustments to Foreign Market Value That Have Been Denied.* Counsel for Silver Seiko claimed that the foreign market value of one of its export models should be determined on the basis of constructed value. Counsel for Silver Seiko contended that there were no similar models sold in the home or third country markets. We have determined that the foreign market value for this model should be based upon home market sales of a model which meets the definition of "such or similar" as set forth in Section 771(16) of the Act (93 Stat. 180, 19 U.S.C. 1677(16)). Production of the home market model chosen by the Department for comparison with the U.S. model was discontinued prior to the period of investigation. However, it appears that sales of this model continued during

the period of investigation and that those sales were made in the ordinary course of trade. Therefore, the Department selected this model as the basis for comparison with the export model.

Counsel for Silver Seiko also claimed an adjustment based upon the costs associated with changeover of production lines between home market and export models. This claim is not based upon savings in production costs associated with economics of scale. The costs associated with changes in the production line are costs in the nature of general manufacturing overhead which should be allocated over total production. Since the merchandise being compared is substantially identical this claim has been denied.

Silver Seiko also claimed that an adjustment to foreign market value should be made for certain costs in transporting the merchandise from the factory to the central distribution warehouse. This claim was disallowed since it was not shown to be an expense directly related to the sale under consideration.

D. Basis Of Comparison—Brother

Fo8r[sic] purposes of this determination, the basis of comparison was between purchase price or exporter's sales price, as appropriate, and the adjustd[sic] foreign market value of such or similar typewriters on all imports of portable electric typewriters manufactured by Brother Industries, Ltd. Purchase price, as defined in section 772(b) of the Act, was used for those shipments to the U.S. where the sales were made to unrelated U.S. customers. Exporter's sales price, as defined in section 772(c) of the Act, was used for those sales by Brother Industries which were made to a U.S. firm related to it within the meaning of section 771(13) of the Act (93 Stat. 180, 19 U.S.C. 1677(13). Foreign market value was determined in accordance with section 773 of the Act.

1. *Purchase Price.* Purchase price was calculated on the basis of the delivered sales price to the United States, with deductions for Japanese inland freight, shipping, ocean

freight, brokers and handling charges, United States inland freight and insurance.

2. *Foreign Market Value Compared to Purchase Price.* Brother provided the department with information on actual sales prices of home market models comparable to the export models for sales during the period of investigation. The home market sales were divided into two groups to reflect changes in the list price of the models that occured during the period of this investigation. However, the actual dates of sales in the home market were not provided. In the absence of the dates of sales, foreign market value was calculated on the basis of the weighted average sales price of comparable home market models, calculated for each of the two distinct time periods within the period of our investigation. Adjustment to foreign market value was made for differences in Japanese inland freight expenses. Adjustments to foreign market value were made for differences in circumstances of sale in accordance with section 773(a)(4)(B) of the Act (93 Stat. 183, 19 U..C. 1677b(a)(4)(B)) and § 353.15 of the Commerce Regulations (19 CFR 353.15, 45 FR 8194). Section 353.15(a) of the Regulations provides for adjustment to foreign market value for differences in circumstances of sales which bear a direct relationship to the sales which are under consideration. Section 353.15(b) provides for adjustment to foreign market value for advertising and other selling expenses assumed by the seller that are attributable to a later sale by the purchaser. We have determined that adjustment to foreign market value is warranted for Brother for warranty expenses, certain types of rebates, packing costs and certain types of direct advertising expenses.

Pursuant to section 773(a)(4)(C) of the Act, adjustments to foreign market value were made for differences in physical characteristics of the typewriters being compared. In accordance with § 353.16 of the Regulations, adjustments were limited to differences in cost of production of the typewriters (i.e. cost of materials and labor).

3. *Exporter's Sales Price.* Exporter's sales prices was calculated for Brother on the basis of the selling price to unre-

lated U.S. dealers, with deductions, where applicable, for Japanese inland freight, shipping, ocean freight, brokerage and handling charges, U.S. inland freight, insurance, commissions, freight-out (transportation), co-op advertising, overbilling, warranty costs, accrual advertising, bad debt allowances, selling expenses (indirect), direct and indirect advertising, and collection expenses as appropriate.

4. *Foreign Market Value Compared to Exporter's Sales Price.* For the reasons explained above for foreign market value compared to purchase price, the foreign market value compared to exporter's sales price was calculated on the basis of the weighted average sales price of comparable models in the home market for each of the two distinct time periods of our investigation. Adjustments to foreign market value were granted for differences in Japanese inland freight expenses.

Pursuant to §§ 353.15(a) and 353.15(b) of the Commerce Regulations, adjustments were made to foreign market value for differences in circumstances of sale which bore a direct relationship to the sales under consideration or advertising and other selling expenses of Brother attributable to a later sale of the merchandise by a purchaser. Adjustments were made for after sale rebates, certain advertising expenses, packing and warranty expenses. Brother incurred expenses for commissions in the home market and the United States. In accordance with § 353.15(b) of the Commerce Regulations, an adjustment to foreign market value equal to the difference in commissions was allowed. Foreign market value was adjusted for the exporter's sales price offset. Adjustments to foreign market value were also made for differences in physical characteristics of the typewriters being compared.

5. *Claims for Adjustments to Foreign Market Value that Have Been Denied.* In determining foreign market value for purchase price transactions, counsel for Brother requested an adjustment for commissions incurred in the home market. Brother did not incur expenses for commissions in the United States. As explained above, where commissions are incurred in only one market under consideration, adjustment to foreign

market value is limited to the amount of "other selling expenses" or the amount of the commissions, whichever is less. Since Brother did not incur selling expenses in the United States in purchase price transactions, no adjustment to foreign market value is warranted.

Counsel for Brother also requested adjustment to foreign market value for promotional expenses. Information presented to the Department during this investigation is insufficient to permit an allowance for this claim.

E. Verification

In accordance with section 776(a) of the Act (93 Stat. 186, 19 U.S.C. 1677e(A)), officials of the Department of Commerce verified all information used in making this determination. The officials were granted access to the books and records of the foreign producers and their U.S. subsidiaries and used traditional verification procedures. These procedures included on site inspection of randomly selected source documents (such as financial statement, various accounting ledgers and proof of payment records such as invoices and cancelled checks) pertinent to this investigation, inspection of promotional materials and material advertisements.

The petitioner submitted information based upon independent market research that indicated that certain prices and expenses claimed by the manufacturers were overstated or understated. Based upon the verifications performed in Japan and the United States, we have determined that no reason exists to disregard the information provided by the manufacturers.

F. Public Hearings

A public hearing notice was published in the **Federal Register** on June 23, 1980 (45 FR 41995). Interested persons have been provided an opportunity to present written and oral views in accordance with § 353.44(e) of the Commerce Regulations (19 CFR 353.44(e), 45 FR 82021).

G. Results Of Comparisons Of Foreign Market Value And United States Price

Using the above criteria, United States prices (purchase price or exporter's sales price, as the case may be) were found to be lower than the foreign market value of such or similar typewritters[sic]. Comparisons were made on all portable electric typewriters produced by Brother and Silver Seiko entered, or withdrawn from warehouse, for consumption on or after January 4, 1980 to May 7, 1980.

Margins were found on 74 percent of sales compared. The weighted average margin found with respect to sales by Silver Seiko was 14.91 percent and with respect to sales by Brother was 5.31 percent.

H. Determinations of Antidumping Duties

On the basis of information developed during the ninety day investigation and using the above criteria, I hereby determine that the United States price of portable electric typewriters from Japan, produced by Brother Industries, Ltd. and Silver Seiko, Ltd. are less than the foreign market values of such or similar typewriters.

In accordance with Section 736(c)(3) of the Act (93 Stat. 173, 19 U.S.C. 1673e(c)(3)) Customs officials will be directed to assess antidumping duties equal to the amount determined by the Department during this proceeding for all entries of portable electric typewriters manufactured by Brother and Silver Seiko entered or withdrawn from warehouse for consumption on or after January 4, 1980 to May 7, 1980. For purposes of the assessment of antidumping duties on the entries subject to this determination under section 736, we also intend that this determination constitute the completion of a review under section 751 of the Act which vests in all interested parties the rights flowing from the completion of such a review.

I. Deposit of Estimated Antidumping Duties

In accordance with Section 736(c)(3) Custom officials are being directed to require at the same time as estimated normal

customs duties on the merchandise are deposited, a deposit of estimated antidumping duties pending liquidations of entries of portable electric typewriters from Japan, for all entries, or withdrawals from warehouse for consumption. The estimated antidumping duty deposit required for entries of the subject merchandise shall be 14.91 percent for Silver Seiko; 5.31 percent for Brother; 4.36 percent for Nakajima All; and 7.55 percent for the subject merchandise produced by all other Japanese manufacturers.

This notice is published pursuant to Section 736(c)(3) of the Act (93 Stat. 172, 19 U.S.C. 1673(e), and § 353.48 of the Department of Commerce Regulations (19 CFR 353.48, 45 FR 8204).

John D. Greenwald,

Deputy Assistant Secretary for Import Administration.

August 7, 1980.

[FR Doc. 80-24498 Filed 8-12-80, 8:45 am]

BILLING CODE 3510-25-M

APPENDIX G

United States Court of International Trade.

Dec. 30, 1980.

Court No. 80-9-01343.

SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION, *Plaintiff*,

v.

UNITED STATES, *Defendant*,

and

Brother Industries, Ltd., and Brother International Corporation, and Silver Reed America, Inc., and Silver Seiko, Ltd., *Parties-in-Interest*.

Eugene L. Stewart, Washington, D.C., and Terence P. Stewart, for plaintiff.

Alice Daniel, Asst. Atty. Gen., Washington, D.C., (David M. Cohen, Director, Commercial Litigation Branch, and Velta A. Melnbrencis, Asst. Branch Director, New York City), for defendant.

Tanaka, Walders & Ritger, Washington, D.C. (H. William Tanaka, Donald L. E. Ritger and Wesley K. Caine, Washington, D.C., of counsel), for Brother Industries, Ltd., and Brother Intern. Corp., party-in-interest.

Arter, Hadden & Hemmendinger, Washington, D.C. (William Barringer and Christopher A. Dunn, Washington, D.C., of counsel), for Silver Reed America, Inc., and Silver Seiko, Ltd., party-in-interest.

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR INJUNCTIVE AND INCIDENTAL RELIEF, AND PARTY-IN-INTEREST'S CROSS-MOTION TO DISMISS.

NEWMAN, Judge:

Plaintiff, a well known domestic manufacturer of portable electric typewriters ("PETS"), seeks judicial review of an "Early Determination of Antidumping Duties" by the International Trade Administration, United States Department of Commerce ("Commerce"), published in the *Federal Register* on August 13, 1980 (45 FR 53853-56). This determination, made pursuant to section 736(c) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (P.L. 96-39, 93 Stat. 144) (19 U.S.C. § 1673e(c)), concerns certain PETs from Japan manufactured and imported by the parties-in-interest, Brother and Silver, and entered, or withdrawn from warehouse, for consumption on or after January 4, 1980 to May 7, 1980.[1] Plaintiff predicates subject matter jurisdiction on section 516A(a)(2)(A) and (B)(iii) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. § 1516a(a)(2)(A) and (B)(iii)), raising an issue of novel impression. Under the recently enacted Customs Courts Act of 1980, P.L. 96-417, 94 Stat. 1727, effective November 1, 1980, the Court of International Trade has exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930. 28 U.S.C. § 1581(c).

Presently before the Court is plaintiff's application under section 516A(c)(2) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. § 1516a(c)(2)), to enjoin the liquidation of the entries that were the subject of

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[1] January 4, 1980 was the date of publication by the Treasury Department of its tentative determination of sales at less than fair value, and the date on which liquidation was suspended (44 FR 1220); May 7, 1980 was the date of publication by the International Trade Commission of its affirmative final injury determination (45 FR 30188).

Commerce's early determination of antidumping duties pending the final hearing and disposition on the merits of the action. Additionally, plaintiff requests certain incidental relief, which will be discussed *infra*.

Brother has filed a cross-motion to dismiss for lack of subject matter jurisdiction, which cross-motion is opposed by plaintiff and the Government. Silver does not challenge the Court's jurisdiction (Trans. Oral Arg., 71).[2]

BACKGROUND

On May 9, 1980 Commerce published an Antidumping Duty Order covering imports of PETs from Japan. 45 FR 30618-19.[3] The order provided that all entries of PETs imported from Japan subject to the "Withholding of Appraisement" notice published on January 4, 1980 were liable for possible assessment of antidumping duties. Further, the order directed Customs officers to require a deposit of estimated antidumping duties pending liquidation of entries in the following amounts: 36.53 percent ad valorem for Silver, and 48.70 percent ad valorem for Brother.

In lieu of the deposit of estimated antidumping duties, Commerce may permit the posting of a bond or other security for a period not to exceed ninety days from the date of publication of an antidumping duty order. This alternative is available where Commerce is satisfied, based on information presented to it by a manufacturer, producer, or exporter, that it will be able to determine within ninety days of publication date of the order the foreign market value and the United States price for all

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[2] On October 14, 1980, oral argument was heard on plaintiff's requested injunctive and incidental relief, and Brother's cross-motion to dismiss.

[3] That antidumping duty order is *sub judice* in *Nakajima All Co., Ltd.* v. *United States*, Court No. 80-6-00933; and in *Silver Reed America, Inc., et al.* v. *United States*, Court No. 80-6-00934. Plaintiff, SCM, is a party intervenor in both actions.

merchandise of such manufacturer, producer, or exporter that was entered, or withdrawn from warehouse, for consumption between the date of publication of the affirmative preliminary less than fair value ("LTFV") determination and the date of publication of the International Trade Commission's affirmative final determination. 19 U.S.C. § 1673e(c)(1).

The results of Commerce's determination of foreign market value and United States price serve as the basis for the assessment of antidumping duties on all entries of the merchandise covered by the determination, viz., entries that were made between publication date of the affirmative preliminary LTFV determination and publication date of the affirmative final injury determination. The results also serve as the basis for the deposit of estimated antidumping duties on future entries of merchandise from the particular foreign interested party. 19 U.S.C. § 1673e(c)(3).

In a notice published in the *Federal Register* on May 30, 1980 Commerce stated that Brother and Silver had requested that the deposit of estimated antidumping duties provided for in the Antidumping Duty Order be waived, and that an early determination of antidumping duties be made. Commerce advised that it was satisfied from the information presented by these two Japanese manufacturers that it would be able to timely make the requisite determination for all entries of merchandise of such manufacturers. 45 FR 36464. Commerce further stated (*ibid.*):

> Accordingly, Customs officers are being directed to waive deposit of estimated duty and accept the posting of a bond or other security for all entries of portable electric typewriters manufactured by Brother Industries and Silver Seiko entered or withdrawn from warehouse, for consumption, from the date of publication of this notice.

The results of the early determination of antidumping duties respecting PETs from Japan manufactured by Brother Industries and Silver Seiko were published in the *Federal Register* on August 13, 1980. In its notice, Commerce explained the manner of computing the foreign market value and the United

States price of all entries of the subject merchandise made from January 4, 1980, to May 7, 1980. The results of the comparisons of foreign market value and the United States price were summarized as follows (45 FR at 53855):

> Margins were found on 74 percent of sales compared. The weighted average margin found with respect to sales by Silver Seiko was 14.91 percent and with respect to sales by Brother was 5.31 percent.

Accordingly, Commerce determined that the United States price of Brother and Silver PETs "are less than the foreign market values of such or similar typewriters," (*ibid.*) and then advised:

> Customs officials will be directed to assess antidumping duties equal to the amount determined by the Department during this proceeding for all entries of portable electric typewriters manufactured by Brother and Silver Seiko entered or withdrawn from warehouse for consumption on or after January 4, 1980 to May 7, 1980. [*Ibid.*]

Additionally, it was announced that Customs officers were being directed to require the deposit of estimated antidumping duties on all PETs from Japan entered or withdrawn from warehouse for consumption. In that connection, Commerce announced: (45 FR at 53856):

> The estimated antidumping duty deposit required for entries of the subject merchandise shall be 14.91 percent for Silver Seiko; 5.31 percent for Brother; * * *

Significantly too, the notice of August 13, 1980 stated Commerce's intent that, for purposes of the assessment of antidumping duties on the entries subject to the determination under section 736, the determination constitutes the completion of a review under section 751 of the Act which vests in all interested parties the rights flowing from the completion of such a review.

In this action, plaintiff challenges Commerce's allowance of certain adjustments to the foreign market values for Brother's and Silver's PETs, which adjustments were made for the purpose of comparing either the purchase price or the exporter's sales prices, as appropriate, with the foreign market values

and thereby arriving at the proper antidumping duties to be assessed. The contested adjustments include, *inter alia:* (a) allowances for differences in Japanese inland freight; (b) allowances for differences in merchandise; and (c) allowances for differences in circumstances of sale, including expenses for packing, rebates, and advertising and the so-called exporter's sales price offset.

The purpose of plaintiff's application is to enjoin the liquidation of entries made on or after January 4, 1980 to May 7, 1980, so that such entries may be assessed with antidumping duties in the proper amounts, as determined by this Court. Moreover, plaintiff seeks an order requiring the deposit by Brother and Silver of estimated antitdumping duties in accordance with the terms of the Antidumping Duty Order, respecting all entries, or withdrawals, of the subject merchandise made since January 4, 1980, pending liquidation in conformance with the final decision of this Court.

JURISDICTION

We first consider the threshold jurisdictional issue raise by Brother's cross-motion to dismiss—an issue of first impression.

The nub of Brother's challenge to the Court's jurisdiction is that this action seeks review of a determination made under section 736(c) of the Tariff Act, and that under section 516A judicial review is not provided with respect to a section 736(c) determination.[4]

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[4] Inasmuch as this action was filed and briefs submitted prior to November 1, 1980, effective date of the Customs Courts Act of 1980, the parties have not addressed the question of whether the Court's residual jurisdiction under 28 U.S.C. § 1581(i) would be applicable in the event that the Court should find that the instant action does not fall within the purview of section 516A. See *H.R. Rep. No. 96-1235*, 96th Cong.. 1st Sess. 48 (1980), U.S.Code Cong. & Admin.News 1980, p. 7088; *Royal Business Machines, Inc.* v. *United States et al.*, 507 F.Supp. 1007, 1 CIT—(1980). In view of the conclusions reached in this opinion, it is unnecessary to consider that issue.

In their opposition to Brother's cross-motion, plaintiff and the Government argue that while section 516A does not specifically list determinations made pursuant to section 736 of the Act among those reviewable, an examination of the statutory scheme in its entirety, pertinent legislative history, and the contested determination itself, demonstrate that the Court has jurisdiction over this action.[5]

For the reasons advanced by plaintiff and the Government, I have concluded that Brother's jurisdictional challenge is without merit.

Brother's cross-motion to dismiss for lack of subject matter jurisdiction has raised a novel issue, viz., whether the Court has jurisdiction under section 516A to review an antidumping duty assessment determination made by Commerce prior to the annual review determination required by section 751(a) of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979. In light of the anticipated extensive use of section 736(c) in antidumping duty proceedings, the significance of the jurisdictional question cannot be overemphasized.

While there can be no doubt Congress intended that antidumping duty assessment determinations may be reviewable by this Court, admittedly section 516A does not expressly mention section 736 determinations among those set forth as reviewable. Nonetheless, from the legislative history of the Trade Agreements Act of 1979, it is evident that section 736(c) simply authorizes a "fast-track" section 751(a) review and

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[5] Interestingly, Brother itself has filed an action challenging Commerce's early determination of August 13, 1980 (Court No. 80-9-01436), but counsel for Brother has characterized that action as "essentially protective in nature, and will be pursued only if this Court * * * finds [that it has] jurisdiction." (Brother's memorandum, at 7, footnote 2.)

Contemporaneously with this application and order, I have granted Brother's application for consolidation of the instant action with Court No. 80-9-01436.

determination, and therefore an "early determination" of antidumping duties pursuant to section 736(c) is reviewable as a section 751(a) determination.

Congressional intent that an early determination of antidumping duties made under section 736(c) should be also considered as a determination under section 751, is demonstrated by the reports of both committees that were instrumental in drafting the Trade Agreements Act of 1979.

Thus, the *House Ways and Means Committee Report No. 96-317*, 96th Cong., 1st Sess. (1979) states (page 70):

> Further, the bill provides a limited exception to the requirement of a deposit of estimated duties for importers who have taken steps to eliminate or substantially reduce dumping margins between the date of an affirmative preliminary determination by the Authority and the final affirmative determination by the ITC. Thus, for a three month period following the issuance of an antidumping order, the Authority may continue to permit entry of merchandise subject to the order under bond for individual importers if it has reason to believe that those importers have taken steps to revise their prices to result in a significantly lower dumping margin. *During this three-month period, the Authority will examine the merchandise entered during the period between its preliminary and the ITC's final determination. If assessment on these entries can be made within the three month period in accordance with the procedures of section 751, then assessment will take place and the new dumping margins derived from this assessment will serve as the basis for the deposit of estimated duties on future entries.* [Emphasis added].

Similarly, the *Senate Finance Committee Report No. 96-249*, 96th Cong., 1st Sess. (1979), U.S.Code Cong. & Admin. News 1979, p. 381, commented (page 75):

> Generally, estimated duty deposits equal to the amount of the estimated antidumping duty would be required to deposited at the same time as estimated normal customs duty deposits must be made with respect to the merchandise under section 505(a) of the Tariff Act of 1930 (19 U.S.C. 1505). However, the administering authority

could permit the importer to post a bond or other security in lieu of estimated antidumping duty deposits for not more than 90 calendar days after the date on which the antidumping duty order is published under certain conditions. *The manufacturer, producer, or exporter of the merchandise would be required to supply the authority sufficient information relating to entries of the merchandise made after the date of the preliminary determination by the authority and before the date of the final determination by the ITC to enable the authority to determine the amount of antidumping duties of that merchandise under section 751(a) of the Tariff Act. If the authority permits the posting of bonds or other security in lieu of estimated duty deposits and makes a determination under section 751, then that determination would be the basis for the assessment of antidumping duties imposed on entries made before the date of the afffirmative determination of the ITC.* That determination would also be the basis for the deposit of estimated antidumping duties on entries of merchandise by the manufacturer, producer, or exporter who supplies the information, made on or after the earlier of the date on which the determination is made under section 751(a) or the 90th day after the date on which the antidumping duty order is published. [Emphasis added.]

While the principle respecting the strict construction of statutes waiving the sovereign immunity of the United States is well settled,[6] the plain indication of Congressional intent concerning the interplay of section 736(c) and 751(a) cannot be ignored. *Cf. SCM Corporation* v. *United States, Brother International Corp., Party-in-interest*, 80 Cust.Ct. 226, C.R.D. 78-2, 450 F.Supp. 1178 (1978) (Court's jurisdiction to review negative injury determinations in antidumping proceedings gleaned from Congressional intent).

In this case, based upon the information submitted by Brother and Silver pursuant to section 736(c), Commerce first found that it could make an early antidumping duty determination within ninety days after the publication of the Antidump-

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[6] See *United States* v. *Boe*, 64 CCPA 11, C.A.D. 1177, 543 F.2d 151 (1976).

ing Duty Order of May 9, 1980. Consequently, on May 30, 1980 Commerce permitted Brother and Silver to post bonds or other security in lieu of estimated dumping duties for merchandise entered, or withdrawn from warehouse, for consumption on or after May 30 and before August 8, 1980. 45 FR 36464. Subsequently, Commerce proceeded to determine the foreign market values and United States prices for the merchandise involved. On August 13, 1980 Commerce published its early determination, which not only included a determination of the amount of estimated duties to be deposited regarding future entries, but also included the foreign market values and the United States prices for the merchandise involved, along with certain adjustments to permit their comparison. Plainly, then, Commerce had conducted a review and determination of antidumping duties as provided in section 751. Hence, Commerce correctly observed that its early determination under section 736(c) also constituted the completion of a review under section 751, and expressly so stated in its published determination. 45 FR 58355.

In sum, since Commerce made a section 751 determination for purposes of section 736(c)(2), and since section 751 is specifically reviewable pursuant to section 516A, the early antidumping duty determination in this case is reviewable by this Court pursuant to section 516A.

Brother's memorandum notes the above cited legislative history, but maintains that it should not be used to create ambiguity in sections 736(c) and 751, which provisions according to Brother are clear on their face, and consist of distinct provisions of law, each section being self-contained and serving its own purpose. Continuing, Brother points out that the introductory language of section 751(a) directs the administering authority to review and determine the amount of any antidumping duty "[a]t least once during each 12-month period *beginning on the anniversary of the date of publication of* * * * *an antidumping duty order*". (Emphasis added.) From this language Brother concludes that by its terms, section 751(a) reviews comprise only those which are initiated *after* the

anniversary date of an antidumping order so that an early antidumping duty determination cannot qualify as a section 751 determination. I am unable to agree with such narrow construction of the statute.

The introductory language in section 751(a) merely mandates the administering authority to make a review and determination of antidumping duties once every 12 months following the anniversary date of the antidumping duty order. It does not preclude the Department from making a section 751 determination at an earlier date. That a section 751 determination, such as made here, could be made during the ninety day period following the publication of the antidumping duty order, as may be noted above, is clearly reflected in legislative history.

Admittedly, on a cursory reading of the statutes the relationship between section 736 and 751 is not immediately apparent. Nonetheless, upon careful analysis it becomes apparent that section 736(c) is not an independent, self-contained provision, as insisted by Brother, but rather section 736(c) depends for its effectiveness upon section 751(a). Consequently, Congress did not provide for judicial review of section 736(c) determinations for the simple reason that the significant determinations are all made in accordance with section 751(a) procedures, explicitly reviewable under section 516A. Accordingly, the cross-motion by Brother to dismiss this action for lack of subject matter jurisdiction is denied.

INJUNCTION

We turn to plaintiff's application for injunctive relief pursuant to 19 U.S.C. § 1516a(c)(2).

In subsection (c)(1) of section 516A, 19 U.S.C. § 1516a(c)(1), Congress provided that unless liquidation is enjoined by the Court, entries of merchandise of the character covered by a determination contested under subsection (a) of section 516A shall be liquidated in accordance with the administrative determination, if they are entered, or withdrawn from ware-

house, for consumption on or before the date of publication in the *Federal Register* of a notice of decision of the Customs Court (renamed United States Court of International Trade, effective November 1, 1980), or of the Court of Customs and Patent Appeals, not in harmony with that determination.

In subsection (c)(2) of section 516A, 19 U.S.C. § 1516a(c)(2), Congress permitted the Customs Court to enjoin the liquidation of some or all entries of merchandise covered by a determination upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances. Under the statute, in ruling on a request for injunctive relief the Court must consider, among other factors, whether:

(A) the party filing the action is likely to prevail on the merits,

(B) the party filing the action would be irreparably harmed if liquidation of some or all of the entries is not enjoined,

(C) the public interest would best be served if liquidation is enjoined, and

(D) the harm to the party filing the action would be greater if liquidation of some or all of the entries is not enjoined than the harm to other persons if liquidation of some or all of the entries is enjoined.

The foregoing statutory factors have long been recognized by federal courts in granting preliminary injunctive relief. See, *e.g.*, *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 259 F.2d 921, 925 (D.C.Cir.1958). See also *Zenith Radio Corporation* v. *United States*, 505 F.Supp. 216, 1 CIT ___ (1980); and *Di Jub Leasing Corp., et al.* v. *United States, et al.*, 505 F.Supp. 1113, 1 CIT—(1980).

The entries subject to liquidation with assessment of antidumping duites based upon the early determination published on August 13, 1980, which plaintiff contests in this action, are the entries of PETs manufactured by Brother Industries and Silver Seiko and entered, or withdrawn from

warehouse, for consumption from January 4, 1980 to May 7, 1980.

I have carefully considered, among other things, the four factors delineated in the statute, and have concluded that under the facts and circumstances presented herein injunctive relief is warrented respecting the above-mentioned entries.

Plaintiff claims on the merits that Commerce improperly allowed certain adjustments (noted *supra*) to be made to the homemarket price of each model typewriter such as or similar to an imported model, for the purpose of computing statutory foreign market value. The result of any improper adjustment, of course, would reduce the foreign market value, and thereby diminish the difference between such value and the United States price of the imported articles, viz., reduce or eliminate the dumping margin. *H.R.Rep.No. 96-317*, 96th Cong., 1st Sess. 76 (1979). The merits present a number of highly complex issues which have been but briefly argued by the parties in their memoranda of law submitted to the Court in connection with plaintiff's present application. While I have not arrived at a final decision as to the propriety of any or all of the contested adjustments, at this juncture I have concluded from the arguments presented that plaintiff is likely to prevail on the merits.

Additionally, I find that plaintiff would suffer irreparable harm if liquidation of the entries covered by the early antidumping determination were not enjoined. It appears that in 1980 plaintiff has continued to experience substantial adverse operating results in its PET business, at least partly due to the less than fair value sales by the Japanese manufacturers. To buttress its argument that injunctive relief is necessary to prevent irreparable harm to its PET business, plaintiff cites statistics showing that increased imports of PETs from Japan in 1980 over 1979 have captured an additional share of the market this year at the expense of plaintiff. Moreover, plaintiff's statistics demonstrate that plaintiff continues to suffer a decline in: operating income, return on net sales, production and United States sales. Plaintiff has also shown that its

inventories of United States produced PETs have substantially increased, and that there has been a continuation of price suppression.

It further appears from an affidavit executed by plaintiff's vice-president and general manager that substantial numbers of Japanese made PETs imported earlier this year remain in inventory. Liquidation of the subject entries prior to the final decision in this case would allow any inventoried units to escape the imposition of the correct amount of antidumping duties if plaintiff prevailed on any of the contested adjustments to the foreign market value.

Generally, the public interest is best served by preventing entries subject to assessment of antidumping duties from escaping the correct amount of such duties. This public interest result may be achieved by the procedural safeguard of an injunction *pendente lite* to maintain the *status quo* of the unliquidated entries until a final resolution of the merits.

The parties-in-interest argue that granting injunctive relief to plaintiff would restrict competition and enhance plaintiff's potential monopoly position in the PET business. While Brother notes that in 1975 the Antitrust Division of the Department of Justice opposed plaintiff's antidumping petition on antitrust grounds, nevertheless I have also noted with great interest that presently there is not even a suggestion by the Government in its opposition to plaintiff's application that there may be any monopoly or antitrust implication if liquidations are enjoined. Further, Silver's claim that granting injunctive relief would result in higher consumer prices for PETs is purely conjectural.

Finally, I find that any harm to the parties-in-interest that would result from enjoining liquidations (*e.g.*, pricing uncertainty) is substantially outweighed by the harm that would result to plaintiff if injunctive relief were denied. The existence of the present litigation, as well as the litigation brought by Brother and Silver, make it impossible at this stage to fix with certainty the amount of antidumping duties that may eventual-

ly be assessed on merchandise entered after May 7, 1980. Consequently, the cost and pricing uncertainties experienced by the parties-in-interest will continue whether or not this Court enjoins the liquidation of entries made before May 7, 1980.

While the Court is mindful that Congress intended injunctive relief under section 516A(c)(2) should be regarded as "truly an extraordinary measure and that the relief should not be granted in the ordinary course of events" (*S.Rep.No. 96-249*, at 253, U.S.Code Cong. & Admin.News 1979, p. 639), under all the facts and circumstances, I find that the requested injunctive relief has been fully justified, notwithstanding the commercial uncertainty relating to the suspension of liquidation. In short, if plaintiff should prevail on the merits, liquidation of the involved entries on the basis of the August 13, 1980 determination would further compound the injury to plaintiff resulting from the less than fair value sales of the Japanese PETs, and such injury would be irreparable.

INCIDENTAL RELIEF

Lastly, we come to plaintiff's request for certain incidental relief. Specifically, plaintiff requests this Court to direct that there be collected a deposit of estimated antidumping duties on all PETs manufactured by Brother Industries and Silver Seiko entered, or withdrawn from warehouse, for consumption on and after January 4, 1980, in the amount of 48.70 per cent ad valorem for Brother and 36.53 per cent ad valorem for Silver, as specified in the Antidumping Duty Order issued on May 9, 1980.

I agree with Silver's contention that the Court lacks authority to direct the deposit of estimated duties in an amount other than ordered by Commerce in the contested determination of August 13, 1980 until after there has been a full review of the merits; and that there should not be any modification of the amount of such deposits as incidental to granting an injunction *pendente lite*.

To suspend Commerce's determination of August 13, 1980 and order the deposit of estimated duties in the amounts set forth in the Antidumping Duty Order published on May 9, 1980 would, in effect, prejudge the merits of the instant case at this early stage as part of the expedited procedures accompanying an application for a preliminary injunction. What is more, if this Court were to require deposits of estimated duties in amounts that are different than those prescribed by the contested determination, the Court would effectively be destroying the *status quo*, which is one of the fundamental purposes of granting injunctive relief *pendente lite*. *Cf. Industrial Fasteners Group, American Importers Association* v. *United States*, 85 Cust.Ct., C.R.D. 80-8, 495 F.Supp. 911 (1980); See also *S.Rep.No. 96-249*, 96th Cong., 1st Sess. 252-253 (1979).

Silver also points out that the rates which plaintiff now seeks as a basis for deposits of estimated duties (viz., those determined in the Antidumping Order of May 9, 1980) are predicated upon the same categories of adjustments now challenged by plaintiff; and that if plaintiff's claims are sustained on the merits, then the rates now sought would be as unlawful as the rates now challenged.

Finally, Brother calls attention to the fact, undisputed by plaintiff, that the dumping margins determined by Commerce in the original Antidumping Duty Order were based upon exchange rates for the U.S. dollar and the Japanese yen that are no longer applicable.[7]

For the foregoing reasons, plaintiff's requested incidental relief is denied.

Summed up, then, the history of this complex litigation to date is as follows: On April 9, 1979 plaintiff filed a petition with the Treasury Department regarding PETs from Japan pur-

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[7] The exchange rates applied in the original order related to the period of investigation into alleged sales at less than fair value, viz., November 1978 through April 1979.

suant to the Antidumping Act of 1921, as amended (19 U.S.C. § 160, *et seq.*), and identified three Japanese manufacturers of PETs, including the parties-in-interest Brother and Silver. An Antidumping Proceeding Notice was published on May 18, 1979, and a Notice of Extension of the Investigatory Period was published on November 15, 1979. Thereafter a Withholding of Appraisement Notice was published on January 4, 1980. According to that notice, Treasury had made a tentative determination of less than fair value (LTFV) sales of PETs from Japan. On January 1, 1980, the Trade Agreements Act of 1979 had become effective. In accordance with section 102(b)(2) of that Act, Treasury's tentative determination under the Antidumping Act was treated as a preliminary determination under the new section 733(b) of the Tariff Act of 1930. Pursuant to section 735(a) of the Tariff Act, the administering authority (viz., Commerce) made a final determination, published on March 21, 1980, that PETs from Japan are being sold at LTFV. The Commission, in turn, instituted antidumping investigation No. 731-TA-12 (Final) pursuant to section 735 of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979, to determine whether an industry in the United States is materially injured or is threatened with material injury, or the establishment of an industry in the United States is materially retarded by reason of the LTFV imports from Japan. The Commission's Final Determination of Material Injury was published on May 7, 1980, and on May 9, 1980, Commerce published an Antidumping Duty Order respecting PETs from Japan, specifying *inter alia*, that deposits for estimated antidumping duties would be collected in the following amounts: Silver Seiko, 36.53 per cent ad valorem; and Brother Industries, 48.70 per cent ad valorem. In May 1980, Brother Industries and Silver Seiko requested that they be permitted to deposit bond or other security in lieu of estimated duties purusant to section 736(c) of the Tariff Act of 1930. Having satisfied itself that it could make an early determination of the foreign market value and the United States price for the merchandise which was entered between January 4, 1980 and May 7, 1980, Commerce waived the de-

posit of estimated duty in lieu of security pending the early determination. On August 7, 1980, Commerce made its early determination of antidumping duties respecting PETs from Japan, which was published on August 13, 1980. In its early determination, Commerce specified the amount of the deposit of estimated antidumping duties for future entries, viz., 14.91 per cent ad valorem for Silver Seiko, and 5.3 per cent ad valorem for Brother Industries. Further, Commerce directed that Customs officials should assess antidumping duties equal to the amount determined during the proceeding for all entries of PETs manufactured by Brother Industries and Silver Seiko entered, or withdrawn from warehouse, for consumption on or after January 4, 1980 to May 7, 1980. On September 2, 1980, plaintiff filed a summons in this action contesting the determination of antidumping duty published on August 13, 1980 along with a complaint. The complaint, in substance, challenges various adjustments made by Commerce to the foreign market value of the typewriters. On September 12, 1980, plaintiff filed its application under section 516A(c)(2) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, to enjoin the liquidation of the entries that were the subject of Commerce's early determination of antidumping duties pending the disposition of the merits of the action and for specified incidental relief. As noted herein, the application for injunctive relief is granted; but plaintiff's application for incidental relief is denied.

Accordingly, it is hereby ORDERED:

1. That plaintiff's motion to enjoin the liquidation of entries of portable electric typewriters from Japan on and after January 4, 1980 to May 7, 1980, covered by the early determination of antidumping duties by the International Trade Administration, United States Department of Commerce, published in the *Federal Register* on August 13, 1980 (45 FR 53853-56) is granted.

2. That plaintiff's application for incidental relief is denied.

3. That the cross-motion to dismiss by Brother Industries, Ltd. and Brother International Corporation is denied.

APPENDIX H

BROTHER INDUSTRIES, LTD., AND BROTHER INTERNATIONAL CORPORATION, *PLAINTIFFS* v. UNITED STATES, *DEFENDANT*; SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION, *Party-In-Interest*

Court No. 80-9-01436

SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION, *PLAINTIFF* v. UNITED STATES, *DEFENDANT*, BROTHER INDUSTRIES, LTD., AND BROTHER INTERNATIONAL CORPORATION; SILVER SEIKO, LTD., AND SILVER REED AMERICA, INC., *Parties-In-Interest*

Court No. 80-9-01343

MEMORANDUM AND ORDER ON MOTIONS FOR CONSOLIDATION AND SEVERANCE

[Motion for consolidation granted;
Motion for severance denied.]

(Dated: December 30, 1980)

Alice Daniel, Assistant Attorney General (*David M. Cohen*, Director, Commercial Litigation Branch, and *Velta A. Melnbrencis*, Assistant Branch Director, Esqs.), for the defendant.

Tanaka Walders & Ritger, Esqs. (*H. William Tanaka*, *Donald L. E. Ritger* and *Wesley K. Caine*, Esqs., of counsel) for Brother Industries, Ltd., and Brother International Corporation, party-in-interest.

Arter, Hadden & Hemmendinger, Esqs. (*William Barringer* and *Christopher Dunn*, Esqs., of counsel) for Silver Seiko, Ltd., and Silver Reed America, Inc., party-in-interest.

NEWMAN, Judge: Brother Industries, Ltd., and Brother International Corp. (Brother) have moved to consolidate court No. 80-9-01343 (in which Brother appears as a party-in-interest) and court No. 80-9-01436 (in which Brother appears

as plaintiff). Silver Seiko, Ltd. and Silver Reed America, Inc. (Silver) oppose consolidation and have cross-moved for severance of court No. 80-9-01343 with regard to Silver in the event this court grants Brother's motion. The Government consents to Brother's motion for consolidation and opposes Silver's cross-motion for severance. Smith-Corona Group, Consumer Products Division, SCM Corp. (SCM) has not responded to either of the pending motions.

For the reasons stated below, Brother's motion for consolidation is granted, and Silver's cross-motion for severance is denied.

Rule 42(a) of the Rules of this Court provides:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated under a consolidated complaint; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

In both of the above-captioned actions, plaintiffs challenge the "Early Determination of Antidumping duties" reached by the International Trade Administration, U.S. Department of Commerce (Commerce) pursuant to section 736(c) of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979 (Public Law 96-39, 93 Stat. 201) (19 U.S.C. 1673(c)) (45 F.R. 53853). The respective plaintiffs in both cases contend that Commerce erred as to various respects in calculating inter alia, the estimated antidumping duties to be deposited in connection with entries of certain portable electric typewriters imported from Japan during the same period of time. Thus, in both cases, the same administrative record and determination are the subjects of this court's review. The court cannot completely determine the correctness of the contested determination without resolving the questions raised in both cases concerning various adjustments to foreign market value, and it is clear that the two actions involve common questions of law or fact.

Silver's cross-motion for severance is without merit. As noted in the memoranda of law filed in connection with SCM's application for injunctive and incidental relief in court No. 80-9-01343, which application is decided contemporaneously with this motion and order,[1] the SCM action raises issues of law which are common to both Brother's and Silver's typewriters. Under these circumstances, it makes sense that the issues be briefed and decided in one consolidated case. Severing the action, as requested by Silver, would result in much needless duplication of effort on the part of SCM, the Government and the court, without commensurate benefit to Silver. While, of course, there may be proceedings in the consolidated case that do not directly affect Silver's interest, by the same token it would appear to be of benefit to Silver to know all that is brought to the attention of the court concerning the contested determination which Silver wishes to defend respecting its own typewriters. If there are any matters raised which do not affect Silver, it need not respond. In any event and most certainly, the court is convinced that consolidation is the practical solution for this maze of proceedings.

In essence—and despite the obvious complexity—consolidation of the two cases will promote judicial economy. The court will be concerned with only one administrative record in both actions; there will be no need to monitor extra motions, such as for extensions of time or for summary judgment, etc.; and consolidation will permit the court to resolve all issues relating to the contested administrative determination in a single legal proceeding, albeit complicated.

For the foregoing reasons, it is hereby ORDERED:

1. That the motion for consolidation by Brother is granted; and

2. That the alternative motion for severance by Silver is denied.

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[1] *Smith-Corona Group, Consumer Proaucts Division, SCM Corporation* v. *United States, et al.*, 1 CIT 165, Slip Op. 80-17 (1980).

APPENDIX I

Antidumping Investigations (1982-83)

Foreign Market Value

Certain Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea (Preliminary), 48 Fed. Reg. 50132

Certain Welded Carbon Steel Pipes and Tubes from Taiwan (Preliminary), 48 Fed. Reg. 49902

Certain Circular Welded Carbon Steel Pipes and Tubes from the Republic of Korea (Preliminary), 48 Fed. Reg. 49900

Lightweight Polyester Filament Fabrics from the Republic of Korea (Final), 48 Fed. Reg. 49679; (Preliminary) 48 Fed. Reg. 35979

Certain Carbon Closing Staples and Staple Machines from Sweden (Final), 48 Fed. Reg. 49323; (Preliminary) 48 Fed. Reg. 24755

Color Television Receivers from Taiwan (Preliminary), 48 Fed. Reg. 48490

Color Television Receivers from Korea (Preliminary), 48 Fed. Reg. 48487

Canned Mushrooms from the People's Republic of China (Final), 48 Fed. Reg. 45445; (Preliminary), 48 Fed. Reg. 27768

Carbon Steel Wire Rod from Trinidad and Tobago (Final); 48 Fed. Reg. 43206; (Preliminary), 48 Fed. Reg. 20109

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In the Supreme Court of the United States

OCTOBER TERM, 1983

SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Commerce acted reasonably, and within a constitutionally permissible delegation of statutory authority to determine antidumping duties, in issuing a regulation (19 C.F.R. 353.15(c)) that permits adjustments in the exporter's sales price for all actual selling expenses incurred in the home market up to the amount of selling expenses incurred in the United States market.

2. Whether the "Cost Rule" (19 C.F.R. 353.15(d)), which states that, in determining the amount of adjustments for differences in circumstances of sale of goods subject to antidumping duties, the Secretary of Commerce will be guided primarily by the cost of such differences to the seller, is reasonable and consistent with the underlying statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 713 F.2d 1568. The opinion of the Court of International Trade (Pet. App. 28a-72a) is reported at 540 F.Supp. 1341.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1983. The petition for a writ of certiorari was filed on November 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 772 and 773 of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 181-186, 19 U.S.C. 1677a, 1677b, are set forth in

relevant part at Pet. App. 73a-80a. The relevant regulations of the Department of Commerce, 19 C.F.R. 353.15, are set forth at Pet. App. 81a-82a.

STATEMENT

1. Congress has established an elaborate statutory scheme in an effort to protect United States industries and workers from competition from foreign manufacturers who sell their products at a lower price in the United States than in the home market. When this form of price discrimination, commonly known as "dumping," results in injury to a domestic industry, it is subject to offsetting duties. The current antidumping law was enacted as part of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 *et seq.*, which amended the Tariff Act of 1930, 19 U.S.C. 1673 *et seq.* The Secretary of Commerce has responsibility for implementing the antidumping law.

The statute provides that, if foreign merchandise is sold or likely to be sold in the United States at less than its fair value, to the material injury of a United States industry, then an antidumping duty will be imposed. 19 U.S.C. 1673. The amount of this duty is equal to the amount by which the foreign market value of the merchandise exceeds the United States price.

Proceedings under the antidumping law are conducted in two stages. First, the Department of Commerce ("Department") and the International Trade Commission ("Commission") begin an investigation, either on the Department's own initiative or in response to a petition from an interested domestic party. The Department determines whether foreign merchandise is being sold in the United States at less than its fair value, while the Commission decides whether such imports are causing, or threatening to cause, material injury to a United States industry. If both the Department and the Commission issue affirmative

determinations, the Department then publishes an antidumping duty order requiring the deposit of estimated antidumping duties pending liquidation of entries of merchandise and directing customs officers within a limited period of time to assess an antidumping duty equal to the amount by which the foreign market value of the merchandise at issue exceeds its United States price.[1]

In the second stage, the Department makes an exact assessment of the antidumping duties. The statute allows for an "early determination of duty," which permits foreign manufacturers of dumped merchandise an opportunity for a special review of their pricing structure and the determination of new dumping margins from more current data. 19 U.S.C. 1673e(c). This review is based upon sales of merchandise imported from the date of the Department's preliminary determination to the date of publication of the final injury determination.

Under the statute, "foreign market value" is computed by one of three methods: (1) home market sales; (2) third country sales; or (3) constructed value. The home market sales method is preferred but, in its absence, either of the other methods may be used. Foreign market value computed on the basis of home market sales or third country sales is subject to adjustment under Section 1677b(a)(4) in order to eliminate elements that would distort the price comparison.

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[1]Both the Commission and the Department must make affirmative determinations before antidumping duties are imposed. Thus, the determination by the Department in response to petitioner's request for an investigation in 1974 is irrelevant because the Commission at that time determined that there had been no material injury to petitioner. Contrary to the implication in the petition (Pet. 5), there was no six-year delay in signing an antidumping duty order, since the prior investigation's conclusion of no injury to petitioner was affirmed by the Court of International Trade (Pet. 5 n.5).

The United States price is computed by one of two methods: purchase price or exporter's sales price. The statute attempts to construct value on the basis of arm's length transactions. It provides, therefore, for different methods of computing the United States price depending upon the relationship of the importer to the foreign producer. If the importer is unrelated, purchase price is used. Purchase price is the actual or agreed upon price between the foreign producer and the independent importer prior to the time of importation. If, however, the importer is related to the producer, the statute requires use of the exporter's sales price, which is the price at which goods are eventually sold in an arm's length transaction, whether from the importer to an independent reseller or directly to the public.

The statute attempts to reconstruct both the United States price and the foreign market value at a common point in the chain of commerce so as to allow a fair comparison. The statute, therefore, provides for specific adjustments in order to derive a fair United States price for comparison with foreign market value. The adjustments provided in Section 1677a(d) are applicable to both purchase price and exporter's sale price. The additional adjustments provided in Section 1677a(e) are applicable only to exporter's sales price. As noted, foreign market value is also subject to adjustment.

The Department computes and, if necessary, adjusts both the United States price and the foreign market value of the merchandise. It then compares these values which, after adjustment, should be on an equivalent basis. The amount by which the foreign market value exceeds the United States price is the "dumping margin" and is then imposed as an antidumping duty.

The statutory adjustments to foreign market value include allowances for all packing "costs, charges, and expenses" to the foreign manufacturer or exporter involved in placing the merchandise in condition to ship to the United States. 19 U.S.C. 1677b(a)(1). The adjustments to United States price are for specified direct costs. 19 U.S.C. 1677a(d). If the exporter's sales price is used, additional allowances are applicable, including the amount of any sales commissions in the United States, "expenses generally incurred by or for the account of the exporter in the United States in selling" the merchandise, and any increased value resulting from post-import manufacture or assembly. 19 U.S.C. 1677a(e).

In addition to these adjustments, the statute provides that, "[i]n determining foreign market value, if it is established to the satisfaction of the [Secretary of Commerce] that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to * * * *other differences in circumstances of sale* * * * then due allowance shall be made therefor." 19 U.S.C. 1677b(a)(4)(B) (emphasis added).

In accordance with the statute's provision that "[r]egulations necessary or appropriate to carry out actions proposed in any statement of proposed administrative action * * * shall be issued" (19 U.S.C. 2504(b)), the Secretary of Commerce has issued regulations relating to differences in circumstances of sale. 19 C.F.R. 353.15.[2] The regulations

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[2]In his statement of administrative action submitted to Congress, the Secretary of the Treasury, who was then the administering authority, proposed the following action with regard to foreign market value (House Doc. 96-153 (Pt. II), 96th Cong., 1st Sess. 411 (1979)):

> By regulation, the [administering authority] will establish groups of adjustments based on those currently recognized, namely, those

provide that reasonable allowances will be made for bona fide differences in circumstances of sale "to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences." 19 C.F.R. 353.15(a).

In general, differences for which allowance is made "are limited * * * to those circumstances which bear a direct relationship to the sales which are under consideration." 19 C.F.R. 353.15(a). These include "differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising or other selling costs." 19 C.F.R. 353.15(b). Reasonable allowances are generally "made for differences in commissions" but not for "differences in advertising and other selling costs of a seller, unless such costs are attributable to a later sale of merchandise by a purchaser." *Ibid.*

The regulations also contain a "Special Rule" which provides that, when comparisons are made using the exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market." 19 C.F.R. 353.15(c). In another section, known as the "Cost Rule," the regulations provide that, "[i]n determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such differences to

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based on differences in the quantities sold, qualitative characteristics of the goods, the circumstances of their sale, and the levels of trade in the markets being compared.

The Trade Agreements Act required that regulations necessary to carry out the actions proposed in the statement be issued within one year after those agreements approved under the Act became effective. 19 U.S.C. 2504(b). The agreements went into effect on January 1, 1980, and the regulations were issued in February 1980. See 45 Fed. Reg. 8182-8208 (1980).

the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise." 19 C.F.R. 353.15(d).

2. Petitioner is a manufacturer of portable electric typewriters. In 1979, petitioner filed an antidumping petition alleging that such typewriters were being sold in the United States at less than fair market value and were injuring the domestic industry. On May 9, 1980, the Department of Commerce issued an antidumping order that announced the determination of the Department and the International Trade Commission that portable electric typewriters from Japan were being sold at less than fair value in the United States to the material injury of the domestic industry (Pet. App. 83a-85a; 45 Fed. Reg. 30618-30619 (1980)).

At the request of respondents Brother Industries, Inc. ("Brother") and Silver Seiko, Ltd. ("Silver"), the Department made an early determination of dumping duties, pursuant to 19 U.S.C. 1673e(c) (Pet. App. 86a-96a; 45 Fed. Reg. 53853-53856 (1980)). The early determination was based upon merchandise entered or withdrawn from the warehouse between January 4, 1980 and May 7, 1980. As part of the early determination, the Department made several adjustments to market value. The estimated dumping margins in this early determination were based on a different time period, and were lower, than the initial estimates in the antidumping order.[3]

In August 1980, petitioner brought an action in the United States Customs Court (now the United States Court of International Trade ("CIT")) contesting this early determination of dumping duties. Petitioner asserted that the

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[3]Antidumping margins were initially estimated at 48.7% ad valorem for Brother and 36.53% ad valorem for Silver; these were reduced to 5.31% ad valorem and 14.91% ad valorem, respectively (Pet. App. 3a n.4).

adjustments to foreign market value permitted by the Department of Commerce were contrary to law and unsupported by substantial evidence in the administrative record. Petitioner contended that the regulations providing for the exporter's sales price offset, 19 C.F.R. 353.15(c), and for reliance on cost to the seller in making reasonable allowances for differences in circumstances of sale, 19 C.F.R. 353.15(d), were inconsistent with and violated the statute. The CIT granted the government's motion for summary judgment and upheld the early determination of antidumping duties in all respects (Pet. App. 28a-72a).

The court of appeals affirmed (Pet. App. 1a-27a). The court held that the statute gives the Secretary of Commerce "broad discretion in making adjustments" and concluded that "the Secretary did not abuse that discretion by relying on the use of cost to make circumstances of sales adjustments" (*id.* at 16a). Similarly, the court upheld the exporter's sales price offset regulation as "a proper and reasonable exercise of the Secretary's authority to administer the statute fairly" (*id.* at 21a). The court also held that, "in determining the amounts of the three specific adjustments challenged by [petitioner], the [Department of Commerce] acted within the framework of the statute and regulations. The amounts of these specific adjustments are supported by substantial evidence" (*id.* at 27a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or any other court of appeals. Congress has vested the United States Court of Appeals for the Federal Circuit and the Court of International Trade with exclusive jurisdiction of actions brought under the antidumping laws. See Pub. L. No. 97-164, § 127(a), 96 Stat. 37-38 (to be codified at 28 U.S.C. 1295(a)(6)); 28 U.S.C. (Supp. V) 1581(c). These courts applied their specialized expertise in this area in ruling that,

under settled principles of law, the regulations at issue were validly promulgated by the Secretary of Commerce in a proper and reasonable exercise of his statutory discretion. Accordingly, further review is not warranted.

1. Petitioner argues (Pet. 10-19) that 19 U.S.C. 1677b(a), as construed by the court of appeals, is unconstitutional because it unlawfully delegates legislative authority to the Secretary of Commerce. At bottom, however, petitioner's complaint appears to be that the so-called "Special Rule" (19 C.F.R. 353.15(c)), which permits adjustments in the exporter's sales price for all actual selling expenses incurred in the home market up to the amount of selling expenses incurred in the United States market, for purposes of determining antidumping duties, is not authorized by the statute. Regardless of how petitioner's argument may be characterized, we submit that the court of appeals was correct in concluding that, in issuing the Special Rule, the Secretary acted reasonably and within the constitutionally permissible authority delegated to him by Congress.

This Court has repeatedly reaffirmed the authority of Congress to "delegate powers to agencies, setting standards to guide their determination." *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342 (1974). Accord, *Hampton & Co.* v. *United States*, 276 U.S. 394, 404-411 (1928). In this case, the Secretary clearly acted within such a constitutional delegation of powers. The antidumping law prescribes an elaborate scheme for the determination and imposition of antidumping duties. It includes general standards for assessing foreign market value and United States price, from which the dumping margin, and thus the appropriate duty, may be computed. The statute delegates to the Secretary the limited authority to issue regulations for determining when a particular difference in circumstances of sale accounts for a price differential and for determining what constitutes differences in circumstances of sale for

which a "due allowance" should be made. The Special Rule was issued in compliance with this limited statutory mandate.

In 19 U.S.C. 1677b(a)(4), Congress provided for a "due allowance" for "other differences in circumstances of sale," without specifying the circumstances. The statute provides that adjustments shall be made to foreign market value if it is established *to the satisfaction of the Secretary* that the amount of any difference between the United States price and the foreign market value of the merchandise is wholly or partly due to differences in circumstances of sale. As the court of appeals noted (Pet. App. 13a), the statute "does not expressly limit the exercise of the Secretary's authority to determine adjustments, nor does it include precise standards or guidelines to govern the exercise of that authority." The statute does not define the term "circumstances of sale" or prescribe any method for determining allowances; rather, "Congress has deferred to the Secretary's expertise in this matter" (*ibid.*).

Although, as the court of appeals observed (Pet. App. 20a), the legislative history is ambiguous on this issue, the offset provided by the Special Rule is clearly required in order to allow a fair comparison between United States price and foreign market value when the exporter's sales price is used to determine United States price. Thus, if a foreign manufacturer incurs selling expenses that have been deducted from the sales price to an unrelated customer in the United States for purposes of calculating the exporter's sales price under 19 U.S.C. 1677a(c) and (d)(2), then some adjustment must also be made to the foreign market value for the selling expenses incurred in selling in the home market in order for there to be a fair and equitable price comparison. As the court of appeals stated (Pet. App. 19a-20a):

> One of the goals of the statute is to guarantee that the administering authority makes the fair value comparison on a fair basis — comparing apples with apples. The offset appears to generate two fair value comparisons, apples with apples (purchase price) and oranges with oranges (exporter's sales price). The difference between United States price generated from purchase price and from exporter's sales price was created by the statute. Were it not for the exporter's sales price offset, comparisons based on purchase price would be fair, yet comparisons based on exporter's sales price would be skewed in favor of a higher dumping margin. We do not believe that the statute requires the Secretary to compare both apples and oranges with only apples. Rather, it expressly requires a fair comparison. The offset is an attempt to achieve such a comparison.

Furthermore, we note that the limitation of the exporter's sales price offset to the amount of selling expenses incurred in the United States keeps the adjustment to a minimum. In short, as the court of appeals concluded (Pet. App. 20a), the Special Rule offset is necessary "to achieve a broader statutory purpose otherwise frustrated because of the alternative statutory methods of computing United States price."

2. Petitioner contends (Pet. 19-25) that the "Cost Rule" (19 C.F.R. 353.15(d)), as construed by the court of appeals, is irrational and embodies an irrebuttable presumption that is inconsistent with the underlying statute, 19 U.S.C. 1677b(a)(4). This contention is without merit.

The Cost Rule provides:

> In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such

> differences to the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise.

Contrary to petitioner's contention, the court of appeals did not construe the Cost Rule in a manner that creates an irrebuttable presumption. Petitioner mischaracterizes the holding of the court of appeals. The court actually stated (Pet. App. 16a-17a n.26):

> We do not hold that the Secretary may blindly rely on cost to the exclusion of its effect on value. Such would clearly violate the statute's primary reliance on value in the computation of antidumping duties, as well as its requirement of a direct relationship. We hold only that, absent evidence that costs do not reflect value, the Secretary may reasonably conclude that cost and value are directly related. [Petitioner] also argues that this would upset the burden of proof on the importer to establish entitlement to adjustments. We cannot agree. The use of cost criteria to satisfy the quantum of evidence required to establish entitlement is reasonable. Whatever the quantum of evidence that would "satisfy" the Secretary, once that evidence is adduced, the "burden" will be "shifted" in every case. [Petitioner's] remedy lies with Congress. Congress can provide more specific guidelines to govern the exercise of the Secretary's discretion; this court cannot.

Thus, rather than creating an irrebuttable presumption, the court simply held that it was within the Secretary's discretion to use cost criteria in determining allowances based on differences in circumstances of sale.[4]

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[4]Petitioner's reliance (Pet. 20-21) on *ICC* v. *J-T Transport Co.*, 368 U.S. 81 (1961), is misplaced. That case simply held that the provision of the Interstate Commerce Act at issue did not authorize the ICC to create a presumption that would have placed upon contract carrier

Moreover, in the antidumping law, Congress itself assumed a correlation between cost and price. The court of appeals noted that the language of the statute "specifies that adjustments are to be made on the basis of differences in *price* or *value*" (Pet. App. 13a) (emphasis in original). This is consistent with the statutory use of value for determining antidumping duties. Yet, as the court of appeals also observed, the statute "does not explicitly forbid reliance on cost" and even "encourages the use of cost to fix foreign market value in some limited circumstances" (*ibid.*) (footnote omitted). In examining the legislative history, the court observed that there were "general theoretical conflicts in legislative purpose" (*id.* at 14a). On the one hand, Congress recognized the unreliability of cost as a basis for computing dumping margins; on the other hand, however, cost data are likely to be the only practical and reliable information available for making circumstances of sale adjustments, especially within the rigid time limits the law imposes on the Secretary (*id.* at 16a-17a). The Cost Rule is consistent with this approach because, as the court of appeals concluded, the rule "does not *prohibit* reliance on value, but merely expresses a preference for cost" (*id.* at 17a) (emphasis in original).[5] In sum, petitioner has failed to

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applicants a burden that Congress had specifically rejected when confronted with a proposed amendment to that effect. The decision has no application to this case, because, as we show below in the text, the Cost Rule promulgated by the Secretary accords with the statutory purpose of the antidumping law.

[5]The CIT explained at greater length the need for reliance on cost in making the circumstances of sale adjustment (Pet. App. 44a-45a) (emphasis in original):

> [F]or all practical purposes, the cost approach in most instances is the only efficient means of administering the circumstances of sale adjustment, considering that foreign market value and United States price must under the antidumping law be determined within very strict limits of time * * *.

demonstrate that the court of appeals erred in concluding that the Secretary acted reasonably and within his statutory discretion in promulgating the Cost Rule.

In direct contrast to the primary cost approach provided in 19 C.F.R. § 353.15(d), the alternative market value methodology prescribed by the regulation is much more difficult, and in many instances impossible, to administer fairly and efficiently. To require Commerce to analyze the effects on market value of every difference in circumstances of sale would be to require a highly complex quantification process involving a multitude of economic factors, *including a cost analysis*, and to do so within strict time limits. I have no doubt that if the market value approach were the sole (or even the primary) method utilized for quantifying adjustments for differences in circumstances of sale, as a practical matter the resulting adjustments in many instances would be purely speculative or sheer guesswork.

The present regulation, in any case, does contemplate the possibility of situations where a specific difference in circumstances of sale may bear no perceived market value (or a market value more or less than cost) in either the United States market or in the home market, since the regulation expressly provides that "where appropriate [the administering authority] may also consider the effect of such differences upon the market value of the merchandise." Consequently, the regulation, while it gives primary emphasis to cost differentials, does not preclude a market value analysis in appropriate instances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 83-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION,

Petitioner,

v.

THE UNITED STATES, BROTHER INDUSTRIES, LTD., BROTHER INTERNATIONAL CORPORATION, SILVER SEIKO, LTD., and SILVER REED AMERICA, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR RESPONDENTS BROTHER INDUSTRIES, LTD., AND BROTHER INTERNATIONAL CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the antidumping statute authorizes those provisions of the implementing regulations governing the calculation of antidumping duties which provide (a) for the deduction from "foreign market value" of selling expenses actually incurred by the foreign manufacturer in its home market sales up to the amount deducted from "United States price" for selling expenses incurred in its sales in the United States market (the "exporter's sales price offset"), and (b) for the adminstrator to be guided primarily by a foreign seller's cost in quantifying adjustments to be made for differences in circumstances of sales in the home market and in the United States market.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-766

SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION

Petitioner,

v.

THE UNITED STATES, BROTHER INDUSTRIES, LTD., BROTHER INTERNATIONAL CORPORATION, SILVER SEIKO, LTD., and SILVER REED AMERICA, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR RESPONDENTS BROTHER INDUSTRIES, LTD., AND BROTHER INTERNATIONAL CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 713 F.2d 1568 and is set out as Appendix A to the petition (Pet. 1a-27a).[1] The

[1] References to the Transcript of Record in the court below, which has been filed in this Court, are designated "R. ____;" references to the petition are designated "Pet. ____."

opinion of the United States Court of International Trade (Pet. 28a-72a) is reported at 540 F. Supp. 1341.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1983. The petition for a writ of certiorari was filed on November 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, are set forth in Appendix C to the petition (Pet. 73a-80a) and also, together with section 3(b) of the Trade Agreements Act of 1979, in Appendix A to this brief at pages 1a-5a. The relevant portions of the regulations issued by the Secretary of Commerce are set forth in Appendix D to the petition (Pet. 81a-82a) and Appendix B to this brief at pages 6a-7a.

STATEMENT OF THE CASE

Petitioner, the Smith-Corona Group of SCM Corporation, a domestic manufacturer of portable electric typewriters (PETs), seeks to overturn an "Early Determination of Antidumping Duties" issued by the Department of Commerce.[2] The determination required the respondents, Brother Industries, Ltd., and Brother International Corp. (collectively Brother)[3], manufacturers and

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[2] 45 Fed. Reg. 53,853 (1980); Pet. 86a-96a.

[3] Brother Industries, Ltd., is a Japanese corporation and is not a subsidiary or affiliate of any other organization. Brother International Corporation is incorporated in the State of Delaware and is a wholly-owned subsidiary of Brother Industries, Ltd.

importers, respectively, of Japanese PETs, and Silver Seiko, Ltd., and Silver Reed America, Inc. (collectively Silver), to deposit estimated antidumping duties pending liquidation of entries. Petitioner challenges various price adjustments granted by the Commerce Department, pursuant to its regulations, which petitioner claims improperly reduced the amount of the estimated antidumping duties.

1. *The statute.* The current antidumping law[4] (the Act), enacted by the Trade Agreements Act of 1979[5] as an amendment to the Tariff Act of 1930, replaced the Antidumping Act, 1921.[6] The purpose of the law is to prevent and protect against dumping, generally defined as the sale of a product in an export market at a price lower than that charged in the domestic market. The statute provides for the imposition of a special antidumping duty if foreign merchandise is found to be sold in the United States at less than its "fair value," to the material injury of a United States industry.[7] The amount of the duty is equal to the "dumping margin," that is, the amount by which the "foreign market value" (essentially the same as the "fair value") exceeds the "United States price" for the merchandise.[8] The purpose of the duty is not to impose a penalty but to equalize competitive conditions between foreign exporters and affected domestic

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[4] 19 U.S.C. §§ 1673 *et seq.* (Supp. V 1981).

[5] Pub. L. No. 96-39, 19 U.S.C. §§ 2502 *et seq.*, 93 Stat. 144 (1979).

[6] Pub. L. No. 67-10, 42 Stat. 11, as amended.

[7] Section 731, 19 U.S.C. § 1673. Section references are to the Tariff Act of 1930, as amended.

[8] *Id.*; 19 C.F.R. § 353.1.

industries.[9] The law is so structured as to encourage foreign producers to avoid the duty by selling their merchandise in the United States at prices which are not lower than the prices at which they sell their goods in the home market.

Like its predecessor, the present antidumping law provides for a two-step process: First, an antidumping investigation which may lead to the issuance of an antidumping duty order applicable to all imports of the merchandise in question; and second, the calculation of antidumping duties, and their eventual assessment against the importer, on individual entries of the merchandise. The investigation is initiated by the Department of Commerce[10] and the International Trade Commission either on the Commerce Department's own initiative or by petition of an "interested party."[11] The Commerce Department determines whether the foreign merchandise is being sold in the United States below its fair value, while the Commission determines whether any

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[9] *C.J. Tower & Sons* v. *United States*, 71 F. 2d 438, 445 (C.C.P.A. 1934). Speaking of the Antidumping Act, 1921, the court said: "Great care is provided to have such equalization do complete justice, as is seen by a consideration" of the provisions regarding notice and the methods of calculating foreign market value, purchase price, etc. *Id.* at 443.

[10] The Secretary of Commerce was named as the "administering authority" (the term used in the Act) of the antidumping law, in place of the Treasury Department, by Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979), pursuant to § 771(1), 19 U.S.C. § 1677(1).

[11] Section 732, 19 U.S.C. § 1673a. "Interested party" is defined to include a United States manufacturer of a like product, as well as a foreign manufacturer or exporter or the United States importer of the merchandise. Section 771(9), 19 U.S.C. § 1677(9).

such imports are causing, or threatening to cause, material injury to a United States industry.[12] Once a petitioner, such as the Smith-Corona Group, files a petition accompanied by supporting information reasonably available to it,[13] the Commerce Department proceeds to conduct its less-than-fair-value investigation, principally by means of questionnaires it prepares and submits to foreign manufacturers and exporters and any of their related United States importers, followed by field verification of the responses and other information generated during the investigation.[14]

As an "interested party," a domestic manufacturer is entitled to have access to non-confidential and (subject to protective order) confidential information obtained by Commerce[15] and to participate in any hearing. The Act, while requiring published notice of a hearing and a hearing transcript, expressly exempts hearings from the provisions of the Administrative Procedure Act[16] which provide evidentiary, burden-of-proof, and other rules for hearings relating to administrative rule-making and adjudications, but not investigations such as those involved in antidumping proceedings.[17]

Meanwhile, the Commission is similarly conducting its own injury investigation. In accordance with strict timetables added by the Act, within 45 days and 160 days, respectively, after the filing of the petition or the opening

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[12] Section 731, 19 U.S.C. § 1673.

[13] Section 732(b)(1), 19 U.S.C. § 1673a(b)(1).

[14] Section 776, 19 U.S.C. § 1677e.

[15] Section 777, 19 U.S.C. § 1677f.

[16] 5 U.S.C. §§ 551-559.

[17] Section 774, 19 U.S.C. § 1677c.

of the Commerce Department investigation, preliminary determinations must be made by the Commission regarding injury, and the Commerce Department regarding less-than-fair-value sales, in each case based upon the best information then available to the agency.[18] Within 75 days (unless extended) after issuance of an affirmative Commerce Department preliminary determination, which must include estimated average dumping margins,[19] the Commerce Department must make its final determination of whether the merchandise is being sold in the United States at less than fair value.[20] The Commission's final determination regarding injury normally must be made within 45 days after that of Commerce.[21]

If both final determinations are affirmative, Commerce publishes an antidumping duty order requiring the deposit of estimated antidumping duties pending liquidation of entries of merchandise and directing Customs officers to assess, within six months after Commerce receives satisfactory information on which to base the assessment, an antidumping duty equal to the amount by which the foreign market value of the particular merchandise entered exceeds its United States price.[22] This ends the first stage of the proceedings.

The second stage consists of the actual assessment of dumping duties. The Act provides for an "early determination of duty"[23], such as is here at issue. This

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[18] Section 733, 19 U.S.C. § 1673b.

[19] Section 733(b)(1), 19 U.S.C. § 1673b(b)(1).

[20] Section 735(a), 19 U.S.C. § 1673d(a).

[21] Section 735(b)(2), 19 U.S.C. § 1673d(b)(2).

[22] Sections 735(c)(2) and 736(a), 19 U.S.C. §§ 1673d(c)(2) and 1673e(a).

[23] Section 736(c), 19 U.S.C. § 1673e(c).

affords foreign manufacturers, whose merchandise has been found to be dumped based upon comparison of the foreign market value and United States price of sales made during the period covered by the investigation, an opportunity for a special review of their current pricing structure and to have new dumping margins determined from this more current data. The Act prescribes the period to be used in this review as sales of merchandise imported from the date of the affirmative preliminary determination by Commerce to publication of the Commission's final injury determination.[24]

Since the purpose of determining the foreign market value of the merchandise is to compare it with the United States price, "foreign market value" is defined, as here pertinent, as the price at which such or similar merchandise is sold for home consumption, increased by the amount of all packing "costs, charges, and expenses" to the foreign manufacturer or exporter, including containers and coverings, incident to placing the merchandise in condition for shipment to the United States.[25] "United States price" means either "purchase price"—the price at which merchandise is purchased from the manufacturer for exportation to the United States—or, as here applies, "exporter's sales price"—the price at which merchandise is sold in the United States "by or for the account of the exporter"[26], with "exporter" being defined as including the United States importer if, as here, the importer is related to the exporter or manufacturer.[27]

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[24] *Id.; see also* S. Rep. No. 249, 96th Cong., 1st Sess. 76 (1979), *reprinted in* [1979]2 *U.S. Code Cong. & Ad. News* 381.

[25] Section 773, 19 U.S.C. § 1677b.

[26] Section 772(a), (b) and (c), 19 U.S.C. § 1677a(a), (b) and (c).

[27] Section 771(13), 19 U.S.C. § 1677(13).

Both purchase price and exporter's sales price are subject to statutory adjustments for specified direct costs, some increasing and others reducing the price.[28] If exporter's sales price applies, it is to be further reduced by the amount of any sales commissions in the United States, "expenses generally incurred by or for the account of the exporter [and, by definition, a related importer] in the United States in selling" such merchandise, and any increased value resulting from any post-importation manufacture or assembly.[29] Since the dumping margin is the amount by which the adjusted foreign market value exceeds the adjusted (in this case) exporter's sales price, the adjustment which adds packing costs to foreign market value increases the dumping margin, as do the deductions from exporter's sales price, while the additions to exporter's sales price decrease the dumping margin.

In addition to these mandatory adjustments, the Act provides that, "if it is established to the satisfaction of" the Secretary of Commerce that the amount of any difference, or lack of it, between the United States price and the foreign market value is wholly or partly due to differences in quantities or physical characteristics between the merchandise sold in the two markets, or "other differ-

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[28] These prices are to be increased by packing costs not included in the price; any import duties and (if applicable to domestically-sold merchandise) direct taxes imposed by the country of exportation which, because of the exportation, are rebated or not collected; and certain United States countervailing duties imposed. They are to be reduced by the amount (if included in the price) of "any additional costs, charges, and expenses" and most United States import duties incident to shipment to the United States; and certain export taxes, duties or other charges imposed by the exporting country. Section 772(d)(1) and (2), 19 U.S.C. § 1677a(d)(1) and (2).

[29] Section 772(e), 19 U.S.C. § 1677a(e).

ences in circumstances of sale . . . then due allowance shall be made therefor" in determining foreign market value.[30] Depending upon the circumstances, adjustments based on such differences may be either added to or subtracted from foreign market value, thereby increasing, decreasing or eliminating any dumping margin which would otherwise be found.[31]

The purpose of these numerous adjustments is to arrive at a fair and equitable comparison, at the same level of trade, between the price of goods sold for export to the United States and those sold in the domestic market.[32]

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[30] Section 773(a)(4), 19 USC 1677b(a)(4).

[31] The Act also allows the Secretary, in certain circumstances, to use sampling techniques and to disregard insignificant adjustments in calculating foreign market value. Section 773(f), 19 U.S.C. § 1677b(f). According to the Senate Report, the purpose is to prevent "delays which are unwarranted and not required by reasonable fairness. It takes into account the administrative burden of assessing antidumping duties on an entry-by-entry basis within the time limits imposed under the bill." *Op. cit. supra.*, note 24, at 96.

[32] When the provision for adjustments based on "other differences in circumstances of sale" was first enacted, the House Committee said of it: "This is designed to facilitate efficient and fair comparison between foreign market value and price to the United States market." H. Rep. No. 1261, 85th Cong., 1st Sess. 7 (1957). Contrary to petitioner's undocumented assertions (Pet. 4), tentatively accepted by the court below (Pet. 51), the level of trade at which the comparison is to be made is essentially ex factory, not "f.o.b. foreign port." *See* Department of Treasury, "Antidumping Duties," in *United States International Economic Policy in an Interdependent World, I Papers* 395 (1971), cited in B. Clubb and P. B. Feller, "The Antidumping Law of the United States," in *A Lawyer's Guide to International Business Transactions, Part I* 93, n.26 (2nd ed. 1977). Logic compels this result, since goods sold in the domestic market are not sold "f.o.b. foreign port."

The authority granted by the Trade Agreements Act of 1979 to issue regulations implementing its provisions was highly unusual due to that act's nature and antecedents. The statute was enacted in accordance with the requirements of the Trade Act of 1974,[33] which had granted the President authority to enter into trade agreements[34] to be implemented by legislation drafted by the President, submitted to Congress together with "a statement of any administrative action proposed to implement such agreement[s], and an explanation as to how the implementing bill and proposed administrative act can change or affect existing law",[35] and passed without amendment under expedited procedures.[36] In 1979, after consultation with Congress, the President submitted a draft bill and the required "Statements of Administrative Action."[37] Accordingly, the resulting statute provides that "[r]egulations necessary or appropriate to carry out actions proposed in any statement of proposed administrative action . . . shall be issued."[38]

2. *The regulations.* The pertinent regulations are those relating to differences in circumstances of sale found in 19 C.F.R. § 353.15 (*infra*, pages 6a-7a).[39] In accordance with the Statements of Adminstrative Ac-

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[33] Pub. L. No. 93-618, 93rd Cong., 88 Stat. 1978 *et seq.*, January 3, 1975, 19 U.S.C. § 2102 *et seq.*

[34] 19 U.S.C. § 2111.

[35] 19 U.S.C. § 2112(d).

[36] 19 U.S.C. § 2191.

[37] *Trade Agreements Act of 1979—Statements of Administrative Action*, H. Doc. No. 96-153, Part II, 96th Cong., 1st Sess. (1979).

[38] 19 U.S.C. § 2504(b), printed *infra* at pages 4a, 5a.

[39] As printed at Pet. 81a-82a, this regulation contains italicized emphasis not found in the original.

tion, the new regulation is substantially identical to its predecessor.[40] As here pertinent, the regulation provides that reasonable allowances for bona fide differences in circumstances of sales will be made "to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences," and that, "in general," such allowances will be limited to differences in circumstances bearing a direct relationship to the sales under consideration.[41] The "Special Rule" providing for the "exporter's sales price offset" (ESP offset) states:

> In making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market.[42]

For purposes of determining the amount of allowances for differences in circumstances of sale, the regulation provides that the "Secretary will be guided primarily by the *cost* of such differences to the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise"[43] (emphasis added).

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[40] 19 C.F.R. § 153.10 (1980). The Statements of Administrative Action stated that "[r]egulations affecting the use of existing terms, such as those relating to adjustments, will generally remain in effect," and, regarding "foreign market value," that "[b]y regulation, the Authority will establish groups of adjustments based on those currently recognized, namely, those based on differences in . . . the circumstances of . . . sale." *Op. cit. supra* in note 37, at 410, 411.

[41] 19 C.F.R. § 353.15(a).

[42] 19 C.F.R. § 353.15(c).

[43] 19 C.F.R. § 353.15(d).

3. *Administrative proceedings.* The antidumping investigation resulting in the Antidumping Duty Order on PETs from Japan, published May 9, 1980[44], was opened by the Treasury Department in May 1979 following the filing of a petition by the Smith-Corona Group, petitioner here.[45] The investigation covered PETs sold to the United States and in the Japanese home market from November 1, 1978 through April 30, 1979.[46] The March 21, 1980 final determination of the Commerce Department found margins, after various adjustments to the foreign market value, purchase price and exporter's sales price, of 48.70 percent *ad valorem* for sales by Brother during the year-earlier period under investigation.

Both Brother and Silver took advantage of the "early determination" provisions of the statute.[47] An examination of Brother's sales during the statutorily-mandated period from January 4 to May 7, 1980, in which Commerce applied the same types of adjustments as it had in its March 21 final determination, resulted in a determination of dumping margins of 4.33 percent on Brother's sales.[48] It is this Early Determination of Antidumping Duties which petitioner challenged in the courts below.

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[44] 45 Fed. Reg. 30,618; Pet. 83a-85a.

[45] 44 Fed. Reg. 29,191.

[46] 45 Fed. Reg. 1,221, (1980).

[47] Section 736(c), 19 U.S.C. § 1673e(c).

[48] 45 Fed. Reg. 53,855 (1980); 46 Fed. Reg. 14,007 (1981). The difference between the margins of 48.70 and 4.33 percent for the investigatory and "early determination" periods, respectively, is explained by two factors: First, a drastic fall in the official Japanese yen rate of exchange from 177 yen to the dollar in November 1978 (T.D. 78-382, 12 Cust. Bull. 817) to 254 yen to the dollar in April 1980 (T.D. 80-103, 14 Cust. Bull. 207); and second, price changes by Brother (*see* 45 Fed. Reg. 53,854) to reduce or eliminate dumping margins, which the Act is designed to bring about.

4. *Proceedings below.* Petitioner's action filed in the United States Customs Court, now the United States Court of International Trade (CIT), which has exclusive jurisdiction of such actions,[49] attacked two provisions of the regulations, those providing for the ESP offset[50] and for primary reliance on cost to the seller in making reasonable allowances for differences in circumstances of sale (the Cost Rule),[51] claiming each is inconsistent with and in violation of the Act (Pet. 33a).[52]

The Court of International Trade, per Newman, J., affirmed the Early Determination of Antidumping Duties in all respects. The court concluded that both challenged regulations "are reasonable, effectuate the Congressional scheme, and were properly applied by Commerce" (Pet. 70a), are in conformity with the entire statutory scheme and the authority granted by Congress, are valid exercises of the discretion granted by the Act, are not precluded by the legislative history, and are supported by long-existing administrative practice.

Regarding the ESP offset, the court held:

> The calculation of dumping margins would be severely distorted if no offsetting adjustments were permitted in the calculation of foreign market value . . . [U]nfairness is eliminated, in part, by the ESP offset

[49] 19 U.S.C. § 1516a.

[50] 19 C.F.R. § 353.15(c).

[51] 19 C.F.R. § 353.15(d).

[52] Petitioner also claimed the amounts of specific adjustments granted by Commerce were not in accordance with the statute and regulations and were unsupported by substantial evidence. Although both courts below ruled adversely to petitioner on these issues, Pet. 21a-27a, 55a-70a, they are not raised in the petition and thus are abandoned.

> since it prevents the imposition of antidumping duties solely as a result of the selling expenses incurred by the manufacturer in the home market. Since . . . the circumstances of sale provision was intended by Congress to facilitate fair comparison between foreign market value and price to the United States market, and since the ESP offset is designed to effectuate that intent, SCM's argument that the ESP offset violates Congressional intent is completely without merit. [Pet. 53a]

Judge Newman similarly found the Cost Rule to be "well within the discretion granted by the statute" (Pet. 37a), grounded on the logic "that under normal market conditions prices directly reflect costs" (Pet. 38a), and in most instances reference to cost is probably the only practical and efficient method of calculating differences in circumstances of sale within the time limits imposed by the Act (Pet. 44a, 45a). The alternative, adjustments based on the market value of various differences in circumstances of sale, would, he held, be virtually impossible to administer, requiring as it would "a highly complex quantification process involving a multitude of economic factors *including a cost analysis*" (Pet. 45a; emphasis in the original).

The Court of Appeals for the Federal Circuit affirmed, finding the two challenged regulations a proper and reasonable exercise of the Secretary's authority, particularly in view of the statute's "tremendous deference to the expertise of the Secretary of Commerce in administering the antidumping law" (Pet. 27a). With several exceptions not relevant to its holdings, the court found itself in agreement with Judge Newman's handling of "all issues"[53] in the case as expressed in his "thoughtful and

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[53] The court below differed with the CIT only in concluding that, regarding both the ESP offset and Cost Rule, the legislative history

comprehensive" and "well-reasoned opinion" (Pet. 12a, 16a).[54] Applying the usual tests to determine the validity of regulations, the court agreed that the statutory language and the general Congressional purpose of achieving a fair, equitable and efficient comparison are sufficient to validate the regulations.[55]

ARGUMENT

Petitioner seeks to raise for the first time in this Court two issues—the constitutionality of the statute and the validity of the "Cost Rule" as measured against a supposed rule of law regarding "irrebuttable presumptions"—which were not raised in either court below,[56] were not decided by them, are thus not available for review by this Court, and cannot properly be raised on petition for a writ of certiorari. Moreover, petitioner's real complaint appears to be that the opinion of the court

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was ambiguous and the administrative interpretation was insufficiently long standing to warrant special deference.

[54] In *Carlisle Tire and Rubber Co.* v. *United States*, 3 CIT ____, Slip Op. 82-37 (May 12, 1982), Judge Maletz of the CIT agreed with the "comprehensive and well-reasoned opinion by Judge Newman" in the case at bar and concluded that it was controlling on the issues presented in *Carlisle*.

[55] We invite the Court's attention to a typographical error in the printing of a sentence in the opinion of the court below in Appendix A to the Petition, at Pet. 13a-14a. The sentence there reads: "Additionally, the statute does not vest broad discretion in the Secretary." As reported it reads: "Additionally, the statute does vest broad discretion in the Sectretary." 713 F.2d 1568, 1576.

[56] The Statement of the Issues set forth in petitioner's Brief for Appellant, at pages 1 and 2, in the court below is reprinted as Appendix B to this brief at page 8a. The issues presented by petitioner to the CIT appear at R. 430-433.

below suffers from internal inconsistencies which, if they in fact exist, should be disposed of by a rehearing, not by this Court.

In any case, two courts vested with specialized and exclusive jurisdiction in customs matters, including the interpretation and application of the antidumping law—the Court of International Trade and the Court of Appeals for the Federal Circuit—have upheld the action of the Secretary of Commerce in issuing the antidumping regulations challenged by petitioner, agreeing on the answers to the questions of statutory interpretation presented to them. Their decisions are clearly correct. Moreover, any other holding would create unfairness and confusion in the administration of the antidumping law. There is neither an actual nor potential conflict with the views of any other circuit, in view of the exclusive subject-matter jurisdiction of the courts below.[57] The petition should be denied.

1. The petition seeks to present to this Court the question of whether the court below committed error "as a matter of federal statutory law and as matter of constitutional separation of powers principles" (Pet. i). The body of the petition, and particularly the two headings of petitioner's substantive arguments,[58] indicate that peti-

[57] 19 U.S.C. § 1516a; 28 U.S.C. § 2645(c).

[58] Omitting capitalization, the first heading states that "the rationale adopted by the Court of Appeals would render the statute an unconstitutional delegation of legislative authority and violates the constitutional requirement of separation of powers;" the second states that "the decision below conflicts with the decisions of this Court," and cites (in subheading A) *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81 (1961). The argument under the first heading deals with the ESP offset; that under the second deals with the Cost Rule.

tioner asks this Court to decide (a) whether, in light of the ESP offset rule, the Act unlawfully delegates legislative authority,[59] and (b) whether the Cost Rule creates an unlawful irrebuttable presumption, is unreasonable, and is therefore an improper exercise of the Secretary's rulemaking authority.

By thus framing the issues, petitioner attempts to raise two issues, one constitutional and one legal, never presented to the courts below for decision.[60] Although the Court of Appeals for the Federal Circuit did no more than affirm the CIT's validation of the Secretary's regulations, petitioner's presentation implies that the appellate court's opinion for the first time created the constitutional and "irrebuttable presumption" issues the petition poses. Plainly, however, this is not the case. If these issues are

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[59] Petitioner principally relies on the 1935 decision in *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495, and *National Cable Television* v. *United States*, 415 U.S 336, 342 (1974). Commenting that the Court's purpose in discussing delegation in *National Cable Television* "was merely to justify a narrow interpretation of a statute," Professor Kenneth Culp Davis adds that "[s]uch a degree of respect for the nondelegation medievalism is astonishing in the 1970s." He cites the concurring and dissenting opinion of Mr. Justice Marshall, joined by Mr. Justice Brennan, in the same case to the effect that "the nondelegation idea 'was briefly in vogue in the 1930's', and that it 'has been virtually abandoned by the Court for all practical purposes'." Davis concludes: "Why should client's money be spent to argue the nondelegation doctrine to the Supreme Court?" Davis, *Administrative Law of the Seventies, Supplementing Administrative Law Treatise* 29, 30, § 2.01 (1976).

[60] The closest petitioner came in the court below to raising the constitutional issue was an admonitory footnote in its Brief for Appellant (at page 18, note 8) to the effect that "[c]ourts will avoid interpreting a statute in a manner which would render it an unconstitutional delegation."

in the case at all (which they are not), they have been there from the passage of the statute and the promulgation of the regulations. Since these issues were not raised in either court below, they cannot be heard in this Court. *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975); *United States* v. *Santana*, 427 U.S. 38, 41, n.2 (1976); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n.2 (1970); *Tyrrell* v. *District of Columbia*, 243 U.S. 1 (1917); Stern and Gressman, *Supreme Court Practice* (5th ed. 1978) § 6.27, at 457. This is particularly true when a belated attempt is made to raise constitutional issues. *Duignan* v. *United States*, 274 U.S. 195, 200 (1927).

The core of petitioner's argument appears to be that, in its view, the opinion of the court below contains internal inconsistencies which drain its ultimate conclusions of their validity (*see, e.g.*, Pet. i, 11, 14-16, 18, 19 and 22). Even if this were the case (which it is not), petitioner's appropriate remedy would seem to be not review by this Court, but rather a petition for rehearing, perhaps with a suggestion of in banc consideration by the court below. F.R.A.P. Rules 35 and 40, 28 U.S.C.A. Petitioner, having failed to seek either of these remedies, should not be heard in this Court.

2. Barely discernible beneath the constitutional mantle with which petitioner seeks to clothe the issues appear to lurk the same routine questions of statutory interpretation presented to and disposed of by the courts below. Both courts examined these questions in full observance of the usual three-part analysis of statutory language, legislative history, and agency practice urged by petitioner (Pet. 17). The gravamen of petitioner's complaint is that the courts did not reach the conclusions it espoused.

Regarding the ESP offset regulation, petitioner claims that in holding this rule valid the court below ignored the statutory language requiring "differences" in circumstances of sale, ignored an asserted statutory requirement (based on legislative history and administrative interpretation) requiring a direct relationship between expenses adjusted under the circumstances-of-sale provision and the sales in question, and nullified the statutory indirect-expense deductions from the exporter's sales price. The result, according to petitioner, is a reading of the statute which grants limitless discretion to the Secretary.

There is not merit in these claims. Adopting those standards of inquiry into the validity of challenged regulations expressed by this Court in *Zenith Radio Corp.* v. *United States*, 437 U.S.C 443, 451 (1978) (Pet. 12a), the court below held:

> The Secretary has broad discretion in executing the law. While the law does not expressly limit the exercise of that discretion with precise standards or guidelines, some general standards are apparent and these must be followed. The Secretary cannot, under the mantle of discretion, violate these standards or interpret them out of existence. [Pet. 4a]
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> * * *
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> The express language of section 1677b(a)(4) provides that allowances will be made if it is established *to the satisfaction of the Secretary* that the amount of any difference between the United States price and the foreign market value of the merchandise is wholly or partly due to differences in circumstances of sale. The statute does not expressly limit the exercise of the Secretary's authority to determine adjustments, nor does it include precise standards or guidelines to govern the exercise of that authority. Additionally, the statute does not define the term

> "circumstances of sale" nor does it prescribe any method for determining allowances. Congress has deferred to the Secretary's expertise in this matter. [Pet. 13a; emphasis in the original.]

In view of this discretion to make adjustments, the court concluded that the exporter's sales price offset "is a proper and reasonable exercise of the Secretary's authority to administer the statute fairly" and therefore is valid (Pet. 21a). Without it, the administration of the statute would be unfairly skewed in favor of a higher dumping margin because indirect expenses would be deducted in calculating exporter's sales price but would not be deducted in calculating foreign market value, resulting in a comparison of apples with oranges rather than apples with apples, as the court noted (Pet. 19). The court properly concluded that this would frustrate the broader statutory purpose of fairness (Pet. 20). While acknowledging that the offset is not based on directly-related costs or "differences" in circumstances of sale, the court below noted that the expenses being offset are also not direct expenses.[61]

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[61] Petitioner misreads the opinion in stating that the court below found the ESP offset *regulation* " 'somewhat anomalous' because it permits an adjustment for circumstances which by definition are not directly related to particular transactions" (Pet. 18). In fact, the court stated that "the *statutory* deduction of selling expense from exporter's sales price, section 1677a(e), is somewhat anomalous" (Pet. 19a; emphasis added). The court concluded that any inconsistency in the ESP offset reglation thus parallels the inconsistency of "the statutory adjustment that it counteracts" *(id.)*. Similarly misplaced is petitioner's reliance on *F. W. Myers & Co.* v. *United States*, 72 Cust. Ct. 219, 376 F. Supp. 860 (1974), for the proposition that "only directly related" expenses qualify under the "differences in circumstances of sale" provision (Pet. 13, 14). As the CIT noted, that case involved purchase price, not exporter's sales price, transactions; consequently the ESP offset was not involved (Pet. 52a).

Petitioner asserts that the court below recognized "the language and the history of the statute . . . *to be directly contrary to the operation of the Special Rule*" (Pet. 15; emphasis in the original). This is, of course, not the case. To the contrary, in upholding the rule the court said that "the statutory language . . . is the only compelling evidence of record regarding the validity of the offset," and found the legislative history to be "ambiguous on this question (Pet. 20a).

As noted earlier, petitioner has failed to address the question of how the antidumping law could be administered fairly without the ESP offset rule which petitioner seeks to have invalidated. In most cases involving the use of exporter's sales price, dumping margins—and therefore liability for dumping duties—would be created or greatly enlarged solely because of the deduction from exporter's sales price of indirect expenses for selling in the United States required by the statute, absent a balancing deduction for similar actual home-market expenses documented by the foreign manufacturer. It is this result which the Secretary, through the exercise of his congressionally-granted discretion, has sought to avoid and which the courts below have upheld. Without the ESP offset, foreign manufacturers and United States importers, such as Brother Industries, Ltd. and Brother International Corporation, would be subjected to the payment of antidumping duties based not on actual price discrimination between markets, the evil sought to be remedied by the antidumping law, but upon artificial price constructs unfairly loaded against them. The antidumping law would thus be transformed from a remedial to a penalty statute. Nothing in the Act permits, much less compels, such a result.

3. Petitioner's challenge to the ruling of the court below upholding the Cost Rule similarly does not with-

stand analysis. Petitioner contends that the court created an "irrebuttable presumption" not in accord with the "principle of law enunciated by this Court in *Interstate Commerce Commission* v. *J-T Transport Company*," *supra* (Pet. 20, 21). In fact, the court below nowhere used the word "presumption," much less "irrebuttable." Moreover, the narrow holding in the *J-T Transport Company* case—that, as a matter of statutory construction, the provision of the Interstate Commerce Act there at issue did not authorize the ICC to create an irrebuttable presumption, 368 U.S. at 89—hardly qualifies as a universal "principle of law." In any case, having failed to present to the courts below an issue of whether the Cost Rule created an irrebuttable presumption, petitioner cannot be heard to argue that issue here.

What the court below *did* conclude, in the note cited by petitioner, was "that, absent evidence that costs do not reflect value, the Secretary may reasonably conclude that cost and value are directly related," that is, that the use of cost criteria to "satisfy" the Secretary that dumping margins are "due to" differences in circumstances of sale is reasonable (Pet. 16a, n.26). The court relied upon the express statutory criterion that such a connection need only be established "*to the satisfaction of the Secretary*" (Section 773(a)(4), 19 U.S.C. § 1677b(a)(4); emphasis added). Concluding, therefore, that the Secretary did not abuse his discretion in promulgating the Cost Rule, the court suggested that petitioner's remedy lies with Congress, not the courts (Pet. 16a, n.26).

At bottom, petitioner's argument rests on concepts of the rules of evidence applicable in a court of law which simply do not apply to administrative investigations of the type here involved, as is manifest from the exemption of antidumping hearings from the evidentiary strictures

of the Administrative Procedure Act.[62] Antidumping proceedings are not adversarial contests between the domestic industry and importers of foriegn products. Rather, they are investigations designed to elicit information on which the administering agencies may reach the non-adjudicatory determinations called for by the Act.

It is well established that the validity of a rational regulation promulgated under statutory authority will be upheld if it is reasonably related to the purposes of the enabling legislation. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973). Despite petitioner's strenuous arguments to the contrary (Pet. 22-25), it is difficult to escape the self-evident, rational conclusion, concurred in by both courts below, that prices are normally related to costs. That the Cost Rule, providing guidance in the quantification of adjustments, is reasonably related to the purposes of the antidumping law is equally self-evident.

The Cost Rule was first officially promulgated in the regulations in 1976, before passage of the 1979 Act with its stringent deadlines for administrative action. If the Commerce Department were now compelled to rely primarily on value-based data, the statute would be almost impossible to administer. As the court of appeals said:

> The ready availability of cost data that can be employed without extensive complex econometric analysis supports the reasonableness of the Secretary's decision to rely on cost. Cost may be the only

[62] Section 774, 19 U.S.C. § 1677c.

> *practical* way to administer the statute. [Pet. 17a, n.27; emphasis in the original.]

To disturb the judgment below would disrupt the "efficient and fair" administration of the antidumping law intended by Congress.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

APPENDIX A

The relevant portions of sections 772 and 773 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. § 1677a and 1677b), are as follows:

SEC. 772. UNITED STATES PRICE [19 U.S.C. § 1677a]

(a) UNITED STATES PRICE.—For purposes of this title, the term 'United States price' means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.

(b) PURCHASE PRICE.—For purposes of this section, the term 'purchase price' means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from the manufacturer or producer of the merchandise for exportation to the United States. Appropriate adjustments for costs and expenses under subsection (d) shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.

(c) EXPORTER'S SALES PRICE.—For purposes of this section, the term 'exporter's sales price' means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, as adjusted under subsections (d) and (e).

(d) ADJUSTMENTS TO PURCHASE PRICE AND EXPORTER'S SALES PRICE.—The purchase price and the exporter's sales price shall be adjusted by being—

(1) increased by—

(A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States,

(B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States;

(C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and

(D) the amount of any countervailing duty imposed on the merchandise under subtitle A of this title or section 303 of this Act to offset an export subsidy, and

(2) reduced by—

(A) except as provided in paragraph (1)(D), the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and

(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the country of exportation on the exportation of the merchandise to the United States other than an export tax, duty, or other charge described in section 771(6)(C).

(e) ADDITIONAL ADJUSTMENTS TO EXPORTER'S SALES PRICE.—For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

(1) commissions for selling in the United States the particular merchandise under consideration,

(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and

(3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

SEC. 773. FOREIGN MARKET VALUE. [19 U.S.C. § 1677b]

(a) DETERMINATION; FICTITIOUS MARKET; SALES AGENCIES.—For purposes of this title—

(1) IN GENERAL.—The foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States—

(A) at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption, or

(B) if not so sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States,

increased by, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of importation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

(2) USE OF CONSTRUCTED VALUE.—If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that merchandise, as determined under subsection (e).

(3) INDIRECT SALES AND OFFERS FOR SALE.—If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 771(13), the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value.

(4) OTHER ADJUSTMENTS.—In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—

(A) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale, for exportation to, or in the principal markets of, the United States, as appropriate, in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale, in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold for home consumption, then for exportation to countries other than the United States);

(B) other differences in circumstances of sale; or

(C) the fact that merchandise described in paragraph (B) or (C) of section 771(16) is used in determining foreign market value,

then due allowance shall be made therefor.

* * * * *

Section 3(b) of the Trade Agreements Act of 1979 (19 U.S.C. § 2504(b)) is as follows:

SEC. 3 RELATIONSHIP OF TRADE AGREEMENTS TO UNITED STATES LAW

* * * * *

(b) IMPLEMENTING REGULATIONS.—Regulations necessary or appropriate to carry out actions proposed in any statement of proposed administrative action submitted to the Congress under section 102 of the Trade Act of 1974 to implement each agreement approved under section 2(a) shall be issued within 1 year after the date of the entry into force of such agreement with respect to the United States.

APPENDIX B

The pertinent regulation issued by the Secretary of Commerce, 19 C.F.R. § 353.15 (1983), is as follows:

§ 353.15 Differences in circumstances of sale.

(a) *In general.* In comparing the United States price with the sales, or other criteria applicable, on which a determination of foreign market value is to be based, reasonable allowances will be made for bona fide differences in the circumstances of the sales compared to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences. Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration.

(b) *Examples.* Examples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising or other selling costs. Reasonable allowances also generally will be made for differences in commissions. Allowances generally will not be made for differences in advertising and other selling costs of a seller, unless such costs are attributable to a later sale of the merchandise by a purchaser.

(c) *Special rule.* Notwithstanding the criteria for adjustments for differences in circumstances of sale set forth in paragraphs (a) and (b) of this section, reasonable allowances for other selling expenses generally will be made in cases where a reasonable allowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual other selling expenses incurred in the one market, or the total amount of the commission allowed in such other market, whichever is less. In making comparisons using exporter's sales price, reasonable allowance

will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market.

(d) *Determination of allowances.* In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such differences to the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise.

APPENDIX C

BRIEF FOR APPELLANT

STATEMENT OF THE ISSUES

1. Whether the International Trade Adminstration's ("ITA") "special rule," 19 C.F.R. § 353.15(c), the "exporter's sales price offset" misinterprets and contravenes the antidumping duty law [now Subtitle B of Title VII of the Tariff Act of 1930, a amended ("the Act").

2. Whether 19 C.F.R.§ 353.15(d), as interpreted by the administering authority, contravenes the statutory criteria for making an adjustment for differences in circumstances of sale under section 773(a)(4) of the Act [19 U.S.C. § 1677b(a)(4)] and contravenes 19 C.F.R.§§ 353.13,353.15(a) of the agency's own regulations.

3. Whether the granting of an adjustment for after-sale rebates, where the rebates were not based solely and directly upon the purchase of portable electric typewriters ["PETs"] and where the amount of the rebate to be received is not known at the time of the sale, was permissible within the meaning of section 773(a)(4) of the Act.

4. Whether the granting of an adjustment for advertising expenses which included multiple product advertising expenses and institutional advertising expenses was in violation of section 773(a)(4) of the Act in that such expenses were not directly related to the sales under consideration and in violation of the administering authority's regulations which permit an adjustment only for an "assumption by a seller of a purchase's advertising or other selling expenses" in reselling the merchandise. 19 C.F.R. § 353.15(b).

5. Whether as a matter of law accessories and printed materials constitute a difference in merchandise within the meaning of sections 771(16) and 773(a)(4)(C) of the Act [19 U.S.C. §§ 1677(16), 1677b(a)(4)(C)] or 19 C.F.R. § 353.16.

Supreme Court, U.S.
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No. 83-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SMITH CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION,

Petitioner,

v.

THE UNITED STATES, BROTHER INDUSTRIES, LTD., BROTHER INTERNATIONAL CORPORATION, SILVER SEIKO, LTD., AND SILVER REED AMERICA, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONER'S REPLY MEMORANDUM

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONER'S REPLY MEMORANDUM

I. THIS CASE PRESENTS SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO GRANT CERTIORARI.

In its opposition, Brother argues that this Court should deny SCM's Petition for Certiorari ("Petition") because "[t]here is neither an actual nor potential conflict with the view of any other circuit, in view of the exclusive subject-matter jurisdiction of the courts below." Brother Opp.16.[1] The government makes a similar argument. U.S. Opp. 8.

[1] References to Respondent United States Opposition Brief are designated U.S. Opp. ____; references to Respondents Brother In-

If this Court were to premise its denial of certiorari on the basis that the opinion is not in conflict with other courts of appeals, this Court would be precluded from examining decisions from the Federal Circuit since that court's jurisdiction is exclusive as to the matters at issue, and thus cannot conflict with decisions of other circuits. However, this Court's discretion is not so artificially limited. Supreme Court Rule 19(1)(b) explicitly permits review where "an important question of federal law has not been, but should be, settled by this Court" or where a court has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

This case meets both of these requirements of Rule 19(1)(b).

The brief of the United States does not deny, and indeed, like the two lower court decisions, confirms the far reaching importance of this case.[2] *Smith-Corona Group, Consumer Products Division, SCM Corporation v. United States*, 713 F.2d 1568 (CAFC 1983) (Pet. App. 1a), is the first judicial opinion reviewing the administering authority's pivotal regulations meant to implement legislation critical to protecting United States commerce from the pernicious effects of "dumping," or selling foreign goods in the U.S. market at prices lower than their fair value. One or both of the challenged regulations—one concerns an "offset" reducing home market price and the other creates a reliance on costs to explain away price discrimination—are central in virtually every antidumping

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dustries, Ltd., and Brother International Corporation's Opposition Brief are designated "Brother Opp. ____;" references to the Petition are designated "Pet. ____."

[2] In its opinion, the Court of International Trade said, "We are faced in this consolidated action with a number of highly complex issues which are of novel impression, and undoubtedly are of great significance in the administration of the nation's antidumping laws," *Brother Industries, Ltd.* v. *United States*, 3 CIT 125, 540 F. Supp. 1341, 1345 (1982) (Pet. App. 28a).

case. Thus, this case will set the future course of the Commerce Department and the Court of International Trade in antidumping matters.

The impact of foreign trade on our national economy has become increasingly critical. Judicial reluctance to intervene in what Congress has long considered a delinquent administration of the unfair trade laws will have incalculable adverse impact on American industry and its workers. The effective enforcement of the remedial provision of these laws where violations have been found, as in the instant case, is thus of great national importance, and so is worthy of consideration by the Supreme Court.

II. ADMINISTRATIVE ACTION MUST BE WITHIN THE LIMITS OF THE STATUTE; CONSEQUENTLY FAIR ADMINISTRATION OF THE ANTIDUMPING LAW REQUIRES INVALIDATION OF THE SPECIAL RULE.

Brother states that "petitioner has failed to address the question of how the antidumping law could be administered fairly without the ESP offset rule which petitioner seeks to have invalidated." Brother Opp. 21. Brother explains that petitioner's position would result in increased antidumping duties "solely because of the deduction from Exporter's Sales Price of indirect expense for selling in the United States required by the statute, absent a balancing deduction for similar actual home-market expenses." *Id.* Similarly, the government's brief argues that the Special Rule is needed "for there to be a fair and equitable price comparison." U.S. Opp. 10.

The Special Rule is not fair. It discriminates between parties Congress sought to treat equally (related and unrelated importers) to the detriment of the intended statutory beneficiary, the domestic industry. The Special Rule results in higher dumping duties being imposed on goods from foreign manufacturers who sell to independent importers than the duties imposed on foreign manufacturers using related-party importers. Congress was suspicious of manufacturers using related

importers because these transactions could be manipulated to evade the dumping laws. Congress designed the statute to protect against such abuses.

To safeguard against duty evasion and impose uniform duties without regard to the importer's status, the statute provides two equivalent formulas for assessing duties. The two-formula approach addresses the problem of how to determine a consistent U.S. price given the Congress' suspicion of related importers. In both formulas, foreign market value and U.S. price are compared to establish the dumping margin and corresponding duty. Both formulas determine foreign market value the same way; U.S. price is determined differently.

The formula applicable to independent importers bases the U.S. price on the Purchase Price the independent importer pays the foreign manufacturer since that is an arm's length transaction. In an Exporter's Sales Price transaction, however, since the foreign manufacturer can manipulate the sales price to its controlled importer, the statute looks to the first arm's length transaction, which occurs when there is a sale in the U.S. market to a third party. To achieve a uniform result in a related party transaction, under the statute that price to a third party is adjusted to eliminate the U.S. selling expense of the related importer. As adjusted, the price provides an estimate of what the f.o.b. foreign country selling price to the importer would have been at arm's length. These statutorily required deductions from Exporter's Sales Price are necessary to yield consistent results in both Exporter's Sales Price and Purchase Price transactions.

The Special Rule changes the statutory calculus for related party transactions in a remarkable way. The Special Rule "offsets" the statutorily required deduction of U.S. selling expense from the Exporter's Sales Price.[3] Thus, the Special

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[3] As the Circuit Court acknowledged, "the offset does permit negation of one specific statutory adjustment," 713 F.2d at 1579 (Pet. App. 20a).

Rule requires an automatic deduction of an equivalent amount of the foreign manufacturer's selling expense in the foreign market, thereby reducing the foreign market value. In an independent importer (Purchase Price) transaction, consistent with the statute, the Secretary makes no such deduction from the foreign market value.[4] The Special Rule automatically lowers the duties only for related party importers, thus resulting in discriminatory treatment.

The Federal Court acknowledges this "skew" but blames it on Congress, saying: "If the statute is skewed by the offset it is because the Secretary, in constructing a fair comparison, has erected the offset on a foundation that was already slightly askew," 713 F.2d at 1579 (Pet. App. 21a).

One thing that is certain from reading the legislative history is that Congress did not intend to "skew" enforcement in favor of related-party transactions, transactions which were by their very nature regarded as suspect. The only justification the court advanced for this discriminatory tampering is that the Special Rule is "fair," even though it results in disparate dumping duties depending upon the status of the importer. However, Congress mandated a comparison of U.S price with foreign market value without such automatic deductions for foreign selling expenses. Appropriate adjustments to foreign market value are already carefully provided in the statute for differences in circumstances of sale.

Implicit in the argument advanced by respondents is the notion that the judiciary and the administrative agency are the

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[4] The Court of Appeals acknowledged the unambiguous statutory language: "The statute does refer repeatedly to foreign market value, as if there were only one foreign market value under consideration" 713 F.2d at 1578 (Pet. App. 19a). But the court simply ignores the statute and endorses the substitution of two foreign market values with the justification that ". . . the statute does not expressly foreclose the use of two different United States price-foreign market value comparisons." *Id.*

arbiters of what is fair. Both court and agency have perverted the expressed intent of the Congress that the agency administer the statute fairly, presuming that fair administration of the law permitted the agency to alter fundamentally the bounds of its discretion as laid down by the statute.

When Congress delegates authority to administrative agencies, the duty of the courts is to assure that administrators abide by the standards limiting agency discretion and that "administrative activity [does not] reach beyond the limits of the statute that created it." *Immigration and Naturalization Service* v. *Chadha*, ___ U.S. ___, 103 S. Ct. 2764, 2785, n. 16 (1983). Thus, the government's reliance on the Court of Appeals' statement that "the Special Rule offset is necessary 'to achieve a broader statutory purpose otherwise frustrated because of the alternative statutory methods of computing United States price,' " is clearly misplaced. U.S. Opp. 11. The Court of Appeals' statement shows that the court knew that the Special Rule was in derogation of the statute, yet the court still upheld it. Neither the courts nor the agency have the constitutional authority to rewrite the statute, violating standards laid down in the statute, eliminating a statutory requirement, and supplanting the judgment of Congress with their own vision of "fairness."[5]

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[5] The appellate court's actions contradict this Court's recent holding in *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, ___ U.S. ___, 104 S. Ct. 439, 444 (1983), in which this Court said:

> [W]hile reviewing courts should uphold reasonable defensible constructions of an agency's enabling Act, . . . they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that *frustrate the congressional policy underlying a statute.*"

(citations omitted) (emphasis supplied). In determining that the administrating agency has made an "unauthorized assumption . . . of [a] major policy decision . . . properly made by Congress," the Court cited *American Ship Building v. National Labor Relations Board*, 380 U.S. at 316, 318 (1965), where it found that the NLRB had

Respondents' allegations that SCM has failed to explain how the statute could be fairly administered miss the point. *Congress* has already explained in the statute how to compare fairly Exporter's Sales Price with foreign market value. 19 U.S.C. § 1677a.

III. THE PETITION FOR CERTIORARI IN THE INSTANT CASE IS PROPERLY BEFORE THE COURT

A. Review by Writ of Certiorari is Proper.

Brother insists that the Petition is not properly before this Court. With no citation of authority whatsoever, Brother urges that petitioner's arguments "should be disposed of by a rehearing" in the Court of Appeals, and that "Petitioner . . . should not be heard in this Court." Brother Opp. 16, 18.

To the contrary, Congress has provided that:

> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

28 U.S.C. § 1254(1). It is axiomatic that "the jurisdiction thus granted is of an extremely comprehensive nature. . . . There are no limitations as to the parties, the status of the case, or the amounts in controversy." R. Stern & E. Gressman, *Supreme Court Practice*, (5th Ed. 1978) § 2.1, at 52. Neither the Federal Rules of Appellate Procedure nor the Rules of the Supreme Court require a party to petition the court of appeals for rehearing before petitioning this Court for writ of certiorari.

B. The Issues Presented in the Petition for Certiorari are Correctly Before This Court.

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construed its functions too expansively when it claimed general authority to define national labor policy by balancing the competing interests of labor and management. The authority to define major policies, including the fundamental fairness of a statutory scheme, is entrusted to the Congress, not to administrative agencies.

Brother claims that petitioner has raised new issues that this Court therefore cannot hear. Brother Opp. 17-18. Brother represents,

> The closest petitioner came in the court below to raising the constitutional issue was an admonitory footnote in its Brief for Appellant (at page 18, note 8) to the effect that "[c]ourts will avoid interpreting a statute in a manner which would render it an unconstitutional delegation."

Brother Opp. 17, n. 60. This is simply wrong.

It is not true, as Brother states, that "Petitioner's presentation implies that the appellate court's opinion for the first time created the . . . 'irrebuttable presumption' issues the petitioner poses." Brother Opp. 17. The Reply Brief for Appellant in the Court of Appeals fully sets forth this issue, plainly showing:

> If situations exist where a producer is willing to set prices below marginal cost, no valid irrebuttable presumption can exist based on the premise that prices will always reflect differences in incremental costs. It is just this invalid assumption which was codified in 1976 in [the Cost Rule] . . . and is applied *automatically* under present agency practices. . . . There is "no rational connection between the fact proved and the ultimate fact presumed," *Tot* v. *United States*, 319 U.S. 463 (1943).

Reply Brief for Appellant, 17-18, and 14 *et seq.*, December, 1982. *See also*, Brief for Appellant, at 19-20 and 27-33, September, 1982.

Brother similarly claims that petitioner newly argues that in light of the Special Rule, the Act unlawfully delegates legislative authority. Brother Opp. 17. Such an assertion misses the point. Petitioner does not contend that Congress unlawfully delegated power to the administering authority within the meaning of *A.L.A. Schechter Poultry* v. *United States*, 295 U.S. 495 (1935). Rather, petitioner maintains that the statute lawfully delegates legislative authority, *so long as it is con-*

strued consistently with the standards limiting agency discretion. The Federal Circuit adopted a construction that renders the statute unconstitutional, in derogation of its responsibility to construe legislation consistently with Congressional intent so as to comport with constitutional limitations. *National Cable Television* v. *United States*, 415 U.S. 336 (1974).

Furthermore, the issue of whether the Court's interpretation renders the statute unconstitutional is in any event properly before this Court in accordance with the general rule that the Supreme Court will consider issues raised in the petition for certiorari which arose from the opinion of the appellate court itself. *Ana Maria Sugar Co.* v. *Quinones*, 254 U.S. 245 (1920). An appeal from an error committed by a lower court is fundamentally different from an attempt to introduce at the appellate level a new theory that had previously been overlooked or disregarded. The appropriate time to raise an error of the appellate court is in a petition for certiorari.

CONCLUSION

For the reasons stated here and in the Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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